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SUPREME COURT OF THE UNITED STATES.

No. 242.

THE PACIFIC RAILROAD OF MISSOURI, APPELLANT,

vs.

GEORGE E. KETCHUM, CORNELIUS K. GARRISON, JAMES SELIGMAN, THOMAS W. PIERCE, THE ATLANTIC & PACIFIC RAILROAD COMPANY, HENRY F. VAIL AND JAMES D. FISH, TRUSTEES, JAMES BAKER, THE MISSOURI PACIFIC RAILWAY COMPANY, AND THE NATIONAL TRUST COMPANY OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 8, 1877.

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1, 2 THE UNITED STATES OF AMERICA,
Eastern District of Missouri, set:

Be it remembered that heretofore, to wit, on the 11th day of November, A. D. 1875, in the circuit court of the United States for the eastern district of Missouri, there appears of record the following entry, to wit:

3 In equity.

GEORGE E. KETCHUM, COMPLAINANT,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS. } No. 703.

Now comes the complainant, by his solicitors, Messrs. Sharp & Broadhead, and files his bill of complaint herein against the said defendants; and, on motion of said solicitors, it is ordered that subpœnas in chancery be issued against the said defendants, returnable to rules, the first Monday, the 3d day of January, 1876.

And the said bill of complaint, so filed as aforesaid, is in words and figures following, to wit:

In the circuit court of the United States for the eastern district of Missouri, in equity.

To the honorable the judges of the circuit court of the United States for the eastern district of Missouri, in the eighth circuit, sitting in equity.

Humbly complaining, shows unto your honors, your orator, George E. Ketchum, a citizen of the State of New York, who brings this bill of complaint against the Pacific Railroad, a corporation created
4 under and by virtue of the laws of the State of Missouri, and against the Atlantic & Pacific Railroad Company, a corporation created and organized under and by virtue of an act of Congress of the United States, approved July 27, 1866, and at the several times hereinafter mentioned, engaged in operating and maintaining a railroad in the State of Missouri, aforesaid, and against James Baker, Rufus J. Lackland, and Dwight Durkee, citizens of the State of Missouri; and Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett, and Luther C. Clark, citizens of the State of New York.

And thereupon your orator complains and alleges that the said Atlantic & Pacific Railroad Company was and is a corporation created in manner aforesaid, and by the aforesaid act of Congress authorized and empowered to sue and be sued, plead and be impleaded, defend and *and* be defended in all courts of law and equity within the United States.

Your orator further complains and alleges:

First. That the said Pacific Railroad, defendant herein, made and delivered to the defendants, Uriel A. Murdock, James Punnett, and Luther C. Clark, a mortgage or deed of trust, dated July 15th, 1868, which said Pacific Railroad conveyed and mortgaged to said Murdock, Punnett and Clark all and singular of the entire line of the Pacific Railroad, two hundred and eighty-three miles in length, extending from the depot at Fourteenth street, in the city of St. Louis, and passing through the counties of St. Louis, Franklin, Gasconade, Osage, Cole, Moniteau, Cooper, Pettis, Johnson, Cass, and Jackson, in the State of

Missouri, and ending at the western boundary of said State of Missouri, at Kansas City; with its appurtenances, including the depots, stations, machine-shops, rolling stock, machinery, rights, interests, and franchises of the said railroad, as trustees, and in trust to secure the payment of the series of seven thousand bonds mentioned in said mortgage, severally dated the first day of August, 1868, for the sum of one thousand dollars each, payable twenty years after date to bearer in gold coin of the United States of America, at the Bank of America, in the
5 city of New York, and interest thereon at the rate of six per cent. per annum, payable semi-annually in gold coin upon the presentation of coupons thereunto annexed; and which said mortgage contained a clause to the effect that if the said Pacific Railroad should fail to pay the interest on any of said bonds secured thereby, for ninety days after the same became due and payable, and demand therefor made, or if the principal sum of any of said bonds, when and as the same became due and payable, should not be paid for the period of ninety days after demand made therefor, said mortgagees or trustees were authorized and required, upon the written request of the holder of any bond, the principal or interest of which should be in arrear or unpaid, to sell the said railroad and property, interest, rights, and franchises thereby mortgaged, at public auction, at the court house in the city of St. Louis, first giving ninety days' notice thereof, and of the time, place, and terms of sale, by notice specified in said mortgage; and on such sale to execute and deliver conveyances, to transfer and convey said property, and all the interest of said mortgagors therein, to the purchaser or purchasers thereof, who were thereby authorized to enter upon and take possession of the same; and in such case said trustees were directed to apply the proceeds of said sale pro rata among the holders of all bonds secured by said mortgage.

Your orator further shows unto your Honors that the whole amount of seven million dollars of bonds mentioned in and secured by said mortgage were executed, issued, and negotiated by said company, and are now outstanding, and that the interest has been duly and regularly paid upon said bonds, and that no interest is due thereon, nor will any mature until February 1st, 1876; and that said mortgage is a first lien upon the property thereby mortgaged.

Second. Yo'r orator further shows unto your Honors that said Pacific Railroad made and delivered to the defendants, Edwin D. Morgan and Joseph Seligman, a mortgage or deed of trust, dated July 1st, 1871, by which said Pacific Railroad conveyed and mortgaged to the said Morgan and Seligman the same property mentioned and described in the preceding mortgage to Murdock, Punnett and Clark, and subject to
6 the lien of said last mentioned mortgage as trustees, and in trust to secure the payment of an issue of three thousand bonds mentioned in the said mortgage, severally dated July 1st, 1871, for the sum of one thousand dollars each, payable twenty years after date, in lawful money of the United States, to the holders of said bonds, at the National Bank of Commerce, in the city of New York, and interest thereon at the rate of seven per cent. per annum, payable semi-annually, in like lawful money, on the presentation of coupons thereunto annexed; and which said mortgage contained a clause, similar in all respects to that mentioned in the preceding mortgage, authorizing the trustees, upon the written request of the holders of any ten or more of the bonds secured thereby, in case of default for ninety days in the payment of the principal or interest after demand, or in case of failure to pay said trustees an annual sum of fifty thousand dollars, thereby agreed to be

paid to reduce said mortgage, to sell and convey the premises therein mentioned, for the benefit of all the bonds secured thereby, without preference or priority.

That the whole amount of said bonds, mentioned in said mortgage, was executed, issued and negotiated by said company; and that under a clause in the said mortgage providing for a sinking fund, one hundred and ninety-six thousand of the bonds secured thereby have been redeemed and cancelled; and that the residue of the entire issue of said bonds secured by said mortgage, amounting to two million eight hundred and four thousand dollars, are now outstanding and unpaid; and that the interest has been duly and regularly paid upon all the bonds outstanding, and that no interest will mature thereon until January 1st, 1876, and that said mortgage is a second lien upon the said property.

Third. That the said Pacific Railroad made and delivered to the defendants, Rufus J. Lackland and Dwight Durkee, a mortgage or deed of trust, dated April 19th, 1872, by which said Pacific Railroad conveyed and mortgaged to the said Lackland and Durkee certain real estate in the city of St. Louis, State of Missouri, in said mortgage described as follows:

7 Four blocks of ground in the city of St. Louis, being city lots numbered four hundred and eighteen, four hundred and twenty-three, four hundred and twenty-eight, and four hundred and thirty-three, bounded east by Seventh street, south by Cerré street, west by Eleventh street, and north by Poplar street; also, block number two hundred and thirteen, in the city of St. Louis, bounded east by Twelfth street, south by Austin street, west by Fourteenth street, and north by Randolph street; saving and excepting therefrom lots 26, 29, 33, and 34, the north one-half of lot number 36, and part of lot number 25, embracing the southwest corner of said block, sixty-six feet eight inches on Fourteenth street by one hundred feet on Austin street.

Also, the following described real estate in the city block number four hundred and thirty eight, viz: Beginning at the northwest corner of Eleventh and Cerré streets in the city of St. Louis, the southeast corner of said block, thence west along the north side of Cerré street, one hundred and fifty-two feet and six inches, more or less, to an alley; thence north one hundred feet; thence east parallel to Cerré street, one hundred and fifty-two feet six inches, to Eleventh street; thence southwardly, on the line of Eleventh street, to the place of beginning.

Also, the following, viz: Commencing on the southwest corner of city block number four hundred and thirty-eight, the northeast corner of twelfth and Cerré streets; thence north one hundred and four feet and six inches; thence east one hundred and fifty-two feet and six inches, to an alley; thence south one hundred and four feet six inches, to Cerré street; thence west one hundred and fifty-two feet six inches to Twelfth street, the place of beginning.

Also, the following described tract or parcel of land, viz: Commencing at the northwest corner of city block number four hundred and thirty-nine, the southwest corner of Twelfth and Cerré streets; thence south one hundred and twenty-six feet, more or less, to the south line of property of the Pacific Railroad; thence eastwardly along said south line to the northeast corner of said block 439; thence along the south line of Cerré street, to the place of beginning; as trustees and in trust

8 to secure the payment of an issue of bonds amounting in the aggregate to eight hundred thousand dollars, each dated May 1st, 1872, payable twenty years after date, in lawful money of the United States, to bearer, at the National Bank of Commerce in the city of New

York, with interest thereon at the rate of eight per cent. per annum, payable semi-annually, in like lawful money, on the presentation of certain coupons annexed to said bonds; of which said bonds six hundred were for the sum of one thousand dollars each, and four hundred for the sum of five hundred dollars each; and which mortgage contained a clause similar to that contained in the preceding mortgage, authorizing the trustees, upon the written request of the holders of any ten or more of the bonds secured thereby, in case of default of ninety days in the payment of the principal or interest, after demand, to sell and convey the premises therein mentioned, for the benefit of all the bonds secured thereby, without preference to priority; and that the whole amount of said bonds were executed, issued, and negotiated by said company, and are now outstanding, and that said mortgage is a first lien on the real estate therein mentioned.

Fourth. Your orator further shows unto your honors that subsequent to the execution and delivery of the aforementioned mortgages the said Pacific Railroad constructed a branch railroad connecting with and intersecting its main line at or near Kirkwood, about thirteen miles west from the city of St. Louis, and extending from the point of such intersection to the Mississippi River at Carondelet, now known as South St. Louis, in the State of Missouri, aforesaid; and also constructed, in connection with said branch railroad, side tracks running to and connecting with furnaces built on the line of the railroad at Carondelet aforesaid; and also erected on said branch road depots, engine-houses, and water-stations, and also a depot at Carondelet, aforesaid; and also purchased and acquired the title to various parcels of real estate on the line of said branch Railroad, at or near Carondelet, aforesaid, for the erection of depots, stations, machine-shops, and other purposes connected with the operation of said branch railroad; and thereupon, said Pacific
9 Railroad made and delivered to the defendants, Jesse Seligman and James Baker, a mortgage or deed of trust, dated October 1st, 1873, by which said Pacific Railroad conveyed and mortgaged to the said Seligman and Baker all and singular the branch railroad constructed and operated as aforesaid, and extending from a point on the main line of the railroad of the parties of the first part, at or near Kirkwood, thence to the termination of said railroad at the Mississippi River at Carondelet, or South St. Louis, aforesaid, with its appurtenances, including the depots, stations, machine-shops, superstructures and erections on the line of said branch railroad, or at Carondelet, aforesaid; together with all the said tracks and switches connected with said branch railroad, and also all the lands acquired and appropriated, or which may be acquired or appropriated for depots, engine-houses, car-houses, station-houses, warehouses, machine-shops, or other superstructures and erections on the line of said branch railroad, or at Carondelet, aforesaid, excluding, however, from the operation or lien of this mortgage the depot at Kirkwood, or any buildings erected, or which may be erected at Kirkwood, aforesaid, for or connected with the operations of the main line of said railroad, as aforesaid, as trustees, and in trust to secure the payment of an issue of five hundred bonds, each for the sum of one thousand dollars, dated October 1st, 1873, payable twenty years after date, to bearer, in gold coin of the United States, at the National Bank of Commerce in the city of New York, and interest thereon at the rate of six per cent. per annum, in gold coin aforesaid, semi-annually, on the first days of April and October, on the presentation of coupons or interest warrants annexed thereto.

That said mortgage contained a clause to the effect that if the said

Pacific Railroad should fail to pay the interest on any of said bonds for six months after demand made therefor, or if the principal sum of any of said bonds, when the same became due and payable, should not be paid for a like period, after like demand, said trustees were authorized and required, upon the written request of the holders of bonds to the amount of one hundred thousand dollars, the principal or interest of which should be in arrear and unpaid, to sell the said property at the court-house in St. Louis, first giving ninety days' notice thereof, as in said mortgage mentioned, and on such sale to execute and deliver conveyances thereof; to transfer and convey said property to the purchaser thereof, and to apply the net proceeds to the payment of all the bonds secured by the said mortgage pro rata.

That each and all of said bonds mentioned in said mortgage were duly executed, issued, and negotiated by the said Pacific Railroad, and are now outstanding and unpaid; and that the interest thereon has been regularly paid, and that no interest will become due thereon until April 1st, 1876, and that said mortgage is a first lien on the property therein mentioned.

Fifth. That the said Pacific Railroad made and delivered to the defendants, Henry F. Vail and James D. Fish, a mortgage or deed of trust dated July 10th, 1875, by which said Pacific Railroad conveyed and mortgaged to the said Vail and Fish all the property, real and personal, rights, interests, and franchises of the said railroad, included in and covered by each of the four mortgages hereinbefore mentioned, as follows, that is to say:

1. The line of the said Pacific Railroad, extending from the depot at Seventh street, in the city of St. Louis, two hundred and eighty-three miles in length, with its appurtenances, including the real estate, depots, stations, machine-shops, rolling stock, machinery, rights, interests, and franchises of the said railroad, subject to the liens of the two mortgages hereinbefore mentioned, severally executed by said company, one of which was so executed to said Murdock, Punnett and Clark, and the other of which was executed to the said Edwin D. Morgan and Joseph Seligman.

2. All and singular the following described real estate in the city of St. Louis, State of Missouri, viz:

Four blocks of ground in the city of St. Louis, being city blocks numbered four hundred and eighteen, four hundred and twenty-three, four hundred and twenty-eight, and four hundred and thirty-three, bounded east by Seventh street, south by Cerré street, west by Eleventh street, and north by Poplar street.

Also block number two hundred and thirteen of the city of St. Louis, bounded east by Twelfth street, south by Austin street, west by Fourteenth street, and north by Randolph street, saving and excepting therefrom lots 26, 29, 33, and 34, the north one-half of lot number 36, and part of lot number 25, embracing the southwest corner of said block, sixty-six feet eight inches on Fourteenth street by one hundred feet on Austin street. Also the following-described real estate in city block number four hundred and thirty-eight, viz: Beginning at the northwest corner of Eleventh and Cerré streets, in the city of St. Louis, the southeast corner of said block; thence west along the north side of Cerré street, one hundred and fifty-two feet and six inches, more or less, to an alley; thence north one hundred feet; thence east, parallel to Cerré street, one hundred and fifty two feet and six inches, to Eleventh street; thence southwardly, on the line of Eleventh street, to the place of beginning.

Also the following, viz: Commencing at the southwest corner of city block number four hundred and thirty-eight, the northeast corner of Twelfth and Cerré streets; thence north one hundred and four feet and six inches; thence east one hundred and fifty-two feet and six inches to an alley; thence south one hundred and four feet six inches to Cerré street; thence west one hundred and fifty-two feet six inches to Twelfth street, the place of beginning.

Also the following-described tract or parcel of land, viz: Commencing at the northwest corner of city block number four hundred and thirty-nine, the southeast corner of Twelfth and Cerré streets; thence south one hundred and seventy-six feet, more or less, to the south line of property of the Pacific Railroad; thence eastwardly, along said south line, to the northeast corner of said block 439; thence along the south line of Cerré street to the place of beginning, being the same property mentioned and described in the aforesaid mortgage executed to Lackland and Durkee, and said premises being so conveyed subject to the lien of said last mentioned mortgage.

3. All and singular the branch railroad of the said Pacific Rail-
12 road, constructed and operated, and extending from a point on the main line at or near Kirkwood; thence to the termination of the said railroad at the Mississippi River at Carondelet or South St. Louis, with its appurtenances, including the depots, stations, machine-shops, superstructures, and erections on the line of said branch railroad, or at Carondelet aforesaid, together with all the side tracks and switches connected with said branch railroad, and also the lands acquired and appropriated, or that may be acquired or appropriated for depots, engine-houses, car-houses, station-houses, warehouses, machine-shops, or other superstructures and erections on the line of said branch railroad, or at Carondelet aforesaid; which said last-mentioned premises and property were so mortgaged subject to the lien of the aforesaid mortgage to Jesse Seligman and James Baker.

That said several parcels of property, franchises, and appurtenances, were so conveyed to Henry F. Vail and James D. Fish, as trustees, and in trust to secure the payment of an issue of four thousand bonds, therein and herein termed "third mortgage bonds," of one thousand dollars each, dated July 10th, 1875, payable twenty years after date, to bearer, in lawful money of the United States, at the office of the Atlantic & Pacific Railroad Company in New York, with interest at seven per cent. per annum, from May 1st, 1875, in like lawful money, semi-annually, on the first of November and May in each year, on the presentation of coupons annexed to said bonds; and that the payment of the principal and interest of each of said bonds was guaranteed by the Atlantic & Pacific Railroad Company.

That said mortgage contained a clause to the effect that, if the said Pacific Railroad should fail to pay the interest on any of said bonds thereby secured for six months after the same became due and payable, and demand made therefor, or if the principal sum of any of said bonds, when payable, should not be paid for six months after demand, said trustees were authorized and required, on the written request of holders of bonds to the amount of five hundred thousand dollars, the principal or interest of which should then be in arrear or unpaid, to sell the said railroad and branch railroad, and all the property by said mort-
13 gage conveyed, at public auction, in the city of St. Louis, giving notice thereof as specified in said mortgage, and to execute and deliver conveyances to transfer and convey said property to the purchaser or purchasers, who might immediately enter upon and take pos-

session of the same, and to apply the net proceeds of said sale to the payment of all the bonds secured by said mortgage, and then unpaid, pro rata.

That said last mentioned mortgage, dated July 10th, 1875, recited the fact, and your orator, on information and belief, avers the fact to be, that said Pacific Railroad had issued its bonds amounting in the aggregate to fifteen hundred thousand dollars, and designated as "income bonds," each of which bonds was dated September 2d, 1872; and of which one thousand were for one thousand dollars each, and eight hundred were for five hundred dollars each, and one thousand for one hundred dollars each, payable in lawful money of the United States, on the first of September, 1892, with interest at seven per cent. per annum, in like lawful currency, on the first of March and September in each year; and that said company had also made a further issue of bonds amounting in the aggregate to the principal sum of two millions dollars, and designated as "improvement bonds," consisting of two thousand bonds of one thousand dollars each, and dated December 15th, 1874, payable in lawful money of the United States, on the first of November, 1889, with interest at seven per cent. per annum, in like lawful money, payable on the first of May and November in each year, on the presentation of coupons annexed to said bonds.

That the interest and principal of said "income" and "improvement" bonds were chargeable against and payable out of the earnings of the said railroad, prior to any dividend on its capital stock, but were not secured by any mortgage or lien upon any of the property hereinbefore mentioned.

That said mortgage also recited and declared that a portion of said third mortgage bonds should be used in retiring and cancelling the issue of income bonds and improvement bonds last above mentioned, so far as the same could be done; and that the residue of said bonds should be issued by said company for the purpose of obtaining additional sums of money for the future permanent improvement of its road.

14 Your orator further shows unto your honors that the entire amount of third mortgage bonds secured by said mortgage were issued by said company, and that a sufficient number of said bonds to retire the "income" and "improvement" bonds were placed in the hands of the trustees in said third mortgage mentioned, to wit, said Vail & Fish, for the purpose of being exchanged for such "income" and "improvement" bonds; and upon information and belief, your orator charges that about two million of dollars of said bonds have been exchanged for "income" and "improvement" bonds as above mentioned, and that in addition upwards of three hundred thousand dollars of said bonds have been negotiated by said company, and that all of said bonds secured by said third mortgage are now outstanding and unpaid, and that none of the interest which became due on said bonds, or any of them, on the first of November, 1875, has been paid, but that the whole amount thereof remains due and unpaid; and that your orator is the holder of many of said third mortgage bonds secured by the aforesaid third mortgage, and that the interest which became due on said bonds was duly demanded on the first day of November, 1875, according to the terms of said mortgage, and the coupons representing said interest were presented for payment at the place where the same, by the terms thereof, are payable, on the first day of November, 1875, and payment demanded and refused.

Your orator further shows that each and every of the mortgages hereinbefore mentioned was duly recorded in the proper offices, and that no

proceedings at law have been had or taken on behalf of any holder of any of the bonds secured by any of the aforesaid mortgages for the recovery of the principal or interest of any of the said bonds herein mentioned or secured by said mortgage, nor any suit or action commenced in regard to or upon said mortgages, or either of them.

Sixth. Your orator farther shows unto your honors that the Pacific Railroad, defendant herein, is a corporation created by and under the laws of Missouri, and that on the 29th of June, 1872, the said Pacific Railroad owned and operated a railroad extending from St. Louis aforesaid
15 to Kansas City, on the western boundary line of the State of Missouri, and which said road extended through Franklin, and also operated several lines of railway connected with its main line, and which had been theretofore leased to it by various railroad corporations owning such lines, and which last-mentioned lines, so leased and then operated by said Pacific Railroad (of Missouri), extended to and from the following points, that is to say, from Tipton to Boonville, both in Missouri, a distance of twenty-five miles; from Sedalia to Lexington, both in Missouri, a distance of fifty-five miles; from Kansas City aforesaid to Leavenworth, Kansas, a distance of twenty-five miles; and from Leavenworth aforesaid to Atchison, Kansas, a distance of twenty-one miles; and your orator charges that the said leased lines and the property appurtenant thereto are bound by the lien of the aforesaid mortgage to James Baker and Henry F. Vail.

That on said last-mentioned day the said Atlantic & Pacific Railroad Company was engaged in the operation of a continuous line of railway from Franklin, in the State of Missouri, distant about thirty-seven miles west from St. Louis, to the western boundary of said State, and thence to Vinita, distant therefrom thirty-five miles; and that said corporation had no mode of reaching St. Louis aforesaid, except over the road of the Pacific Railroad, defendant herein, and that it had no passenger depots, or other adequate depots or facilities for the transaction of its business at St. Louis aforesaid.

That on the day last aforesaid, to wit, the twenty-ninth of June, 1872, the said Pacific Railroad (of Missouri) leased to the said Atlantic & Pacific Railroad Company, upon the terms and conditions in said lease mentioned, the entire line of railroad then operated by it, including the several lines of railway so leased to it as last aforesaid; and thereupon the said Atlantic & Pacific Railroad Company took possession of said lines of railway so leased, and managed and operated the same; and that subsequently to said lease an additional line of road extending from Kirkwood, on the line of said Pacific Railroad, to Carondelet, on the Mississippi River, a distance of fifteen and one-half miles, being the "Carondelet Branch" hereinbefore mentioned, was built, and has been managed and operated by the said Atlantic & Pacific Railroad Company; and that addi-
16 tions and improvements have been from time to time made since said lease by the erection of depots, freight-houses, car-houses and other structures, at and in the immediate vicinity of St. Louis aforesaid, and elsewhere, which were deemed necessary for carrying on the business of said roads, and large amounts of money expended therein and thereabout; and also in the purchase of locomotive-engines and cars, and rolling stock of various descriptions used in operating said road; and since said lease, as aforesaid, the entire lines of road extending from St. Louis through Franklin, aforesaid, to the terminal points of the lines of road of said Alantic & Pacific Railroad Company and of said Pacific Railroad respectively, as above stated, including the lines of road so leased to said Pacific Railroad (of Missouri), and said Caron-

delet Branch, have been operated as one road; and that all the property hereinbefore mentioned is in the possession of the Atlantic & Pacific Railroad Company, and that, as your orator is advised and believes, it is necessary and essential for the interests of all parties interested in said several lines of road, and of the mortgage creditors of said two companies respectively, that said road should be continued to be operated and managed as one road, proper regard being had to the rights of creditors having liens by mortgage upon portions of the railroad premises and property originally belonging to the said Pacific Railroad (of Missouri).

Seventh. Your orator further shows unto your honors that, by the terms of the lease to the said Atlantic & Pacific Railroad Company, the latter company agreed to and became bound to pay the interest on all the mortgages theretofore issued and executed by the said Pacific Railroad, including the mortgages herein firstly, secondly, and thirdly mentioned and described, and also all moneys required to be paid by the said Pacific Railroad under the leases of the several leased lines hereinbefore mentioned, and also certain dividends upon the stock of the said Pacific Railroad, as specified in said lease; and that, by the terms of said lease, a dividend to the shareholders of the said Pacific Railroad of one and one-half per cent. upon the capital stock of the said company became payable under said lease on the 20th day of October, 1875, and that default was made in the payment thereof, and the same
17 still remains due and unpaid. That, in pursuance of the said lease, obligations in various forms for the payment of money were from time to time issued by the Atlantic & Pacific Railroad Company in the name of the said Pacific Railroad, defendant herein, and for the payment of which said last named company is liable; and that said last named company is also liable to pay the principal and interest of the third mortgage bonds dated July 10, 1875, to Baker and Vail.

That the said Atlantic & Pacific Railroad Company has made default in the payment of interest upon its bonds secured by mortgages executed upon the property originally belonging to it before the making of said lease, and has become embarrassed by floating debts to a very large amount, and has been unable to pay the dividends above mentioned, and the interest due November 1st, 1875, upon the third mortgage bonds herein mentioned; and that the creditors of said Pacific Railroad and of the said Atlantic & Pacific Railroad Company have threatened to sue said corporations, and each of them, and have sued said last named corporation.

That there is a large sum of money due for taxes remaining unpaid, for which each of the said railroad companies is responsible; and that the said Pacific Railroad is without sufficient means to pay and discharge its valid obligations in full as they become due; that its commercial paper has been protested; and that it is liable to actions, suits, and proceedings on account thereof; and that the said Atlantic & Pacific Railroad Company is without sufficient means to pay and discharge its valid obligations in full as they become due; that its commercial paper has been protested; and that it is liable to actions, suits, and proceedings on account thereof; and that there is great danger that the property covered by the third mortgage hereinbefore mentioned may be attached or levied upon under execution or other legal process.

That the interest upon the first and second mortgages mentioned herein has been regularly paid as the same became due, and that the premises covered by said mortgages are an abundant and ample security for the payment of the bonds secured by those two mortgages as

they mature; and that the net earnings and income of the rail-
18 road therein mentioned have been, are, and will be, ample and sufficient to provide for, pay, and keep down the interest to become due under all the mortgages hereinbefore mentioned, which are prior liens to the third mortgage; but that the said mortgaged premises are an insufficient and inadequate security for the payment of the amount due and to become due under the mortgage last aforesaid, and that the rights and interests of all parties interested in the said last mentioned mortgage, and the rights and interests of creditors of said Pacific Railroad not secured by mortgage, require that a receiver should be appointed, as hereinafter prayed for.

Your orator further, on information and belief, alleges that default having been made, as hereinbefore stated, by the Atlantic & Pacific Railroad Company, in the payment of interest upon one of the mortgages executed and issued by that company to secure the payment of an issue of six million dollars of bonds, an action was instituted on behalf of the holders of such bonds to foreclose such mortgage, and for the appointment of a receiver of the property and effects of the said company, including the property issued to it by the Pacific Railroad, defendant herein, and that such action is still pending and undetermined.

Eighth. Your orator further shows unto your honors that an application has been made by your orator, on behalf of himself and other holders of bonds secured by said mortgage to the defendants, Henry F. Vail and James D. Fish, to take proceedings to foreclose the aforesaid mortgage, and to protect the interests of your orator and such other holders; but that no such proceedings have been taken; and, as your orator is informed and believes, some doubt is expressed whether, under such mortgage, they have the right to institute such proceedings or any proceedings thereunder, by reason of the non-payment of the interest due November 1st, 1875, and for such reason prefer not to take such proceedings; and your orator, being apprehensive that his interests, and the interests of other holders of like bonds, may be seriously affected by delay in the institution of proceedings to foreclose said mortgage and to obtain possession of said property, has brought
19 this action on his own behalf, and on behalf of all others similarly situated, and holding like bonds secured by said third mortgage, and has made said Vail and Fish parties defendant herein.

In consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and is only relievable in a court of equity, where matters of this kind are properly cognizable and relievable,

Your orator therefore prays that the said mortgage, dated July 10th, 1875, executed by said Pacific Railroad to the defendants, Vail and Fish, may be foreclosed, and that the premises and property covered thereby may be sold under a decree of this honorable court; that the premises and property covered thereby, which are by the terms thereof subject to the two mortgages, one dated July 15th, 1868, to the defendants, Murdock, Punnett, and Clark, and the other dated July 1st, 1871, to the defendants, Edwin D. Morgan and Joseph Seligman, may be sold separately, subject to the lien of said two mortgages; and that the real estate embraced in said mortgage of July 10th, 1875, which is thereby subject to the mortgage dated April 19th, 1872, to the defendants Lackland and Durkee, may be sold separately, subject to the lien of said last mentioned mortgage; and the branch railroad and other property embraced in said mortgage of July 10th, 1875, which by the terms thereof are subject to the mortgage dated October 1st, 1873, to the defendants

Jesse Seligman and James Baker, may be sold separately, subject to the lien of said last-mentioned mortgage; or, if the court should determine that all the property embraced in said mortgage of July 10th, 1875, should be sold in one parcel, subject to the liens of the mortgages thereon existing prior to said July 10th, 1875, the same may be so sold; and that if the court should determine that all the property covered by said several mortgages be sold, and the proceeds applied to the extinguishment of the several prior mortgages thereon, then that the net proceeds of the several parcels of property covered by said several prior mortgages (the liens of which said several prior mortgages upon the several parcels of property embraced therein are hereby recognized) may be applied to the payment of said mortgages respectively, and that, subject to the payment of such prior liens, the net proceeds of
20 the sale of the mortgaged premises under the mortgage of July 10th, 1875, may be applied to the payment of all bonds secured by said mortgage last mentioned, at that time outstanding and unpaid, and of the interest thereon, without discrimination or preference, and rateably; and that the said several defendants in this action, and all persons claiming under them, or either of them, may be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part and parcel thereof.

Your orator further prays that, if necessary, an account may be taken of the bonds secured by the said mortgages, and of the amount due on said bonds for principal and interest, or either, and that a receiver be appointed according to the course and practice of this court, with the usual powers of receivers in like cases, of all the property, equitable interests, things in action, effects, moneys, receipts, and earnings, rights, privileges, franchises, and immunities of the said Pacific Railroad, including the lines of railway and other property transferred to and possessed by the said Atlantic & Pacific Railroad Company, under the aforesaid lease from the Pacific Railroad (of Missouri), or operated by said Atlantic & Pacific Railroad Company, as hereinbefore stated, and all rolling-stock and other property appurtenant to said lines of railway; and that a writ of injunction be issued out of and under the seal of this honorable court, or by one of your honors, according to the form of the statute in such case made and provided, enjoining and restraining the said defendants herein, and each and every of them, except the receiver appointed by this court, from interfering with, transferring, selling or disposing of any of the property aforesaid, or from taking possession of, levying upon, or attempting to sell, either by judicial process or otherwise, any portion of the property aforesaid, or of which said receiver may be appointed; and that your orator may have such further on other relief in the premises as to this honorable court shall seem meet.

And may it please your honors to grant unto your orator a subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the defendants, the Pacific Railroad, the Atlantic & Pacific Railroad Company, James Baker, Rufus
21 J. Lackland, Dwight Durkee, Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett, and Luther C. Clark, respectively, therein and thereby commanding them, on a day certain therein to be named, and under a certain penalty, to be and appear before this honorable court, then and there to answer all and singular the premises, and to stand to, perform, and abide by the said order, direction, and decree as

may be made against them in the premises, as shall seem meet and agreeable to equity and good conscience.

And as to the said several parties who are properly defendants to this bill of complaint, and who may be out of the jurisdiction of this court, your orator prays that process may be issued to make them parties if they should come within such jurisdiction; or that, if they should not come within such jurisdiction, such proceedings may be had in regard to such defendants, by publication or otherwise, to conclude them in this behalf, as may be authorized by and be according to the statutes in such case made and provided.

And your orator, as in duty bound, will ever pray, &c.

GEORGE E. KETCHUM.

SHARP & BROADHEAD,
Of counsel for Compl't.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

George E. Ketchum, being sworn, says that he is the plaintiff in the foregoing bill named, and has read the same, and knows the contents thereof, and that the matters and facts therein stated are true.

GEORGE E. KETCHUM.

Sworn and subscribed before me, by the said George E. Ketchum, on this 3d day of Nov., 1875.

[SEAL.]

GEO. F. BETTS,
U. S. Commissioner Southern District of New York.

22 And thereupon a subpœna in chancery was issued, which appears in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri, set:

In the circuit court of the United States in and for said district.

The President of the United States to the Pacific Railroad, the Atlantic and Pacific Railroad Company, James Baker, Rufus J. Lackland, Dwight Durkee, Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett, and Luther C. Clark, greeting:

You are hereby commanded to be and appear at rules to be held at the office of the clerk of the circuit court of the United States in and for the eastern district of Missouri, on the first Monday of January next, at the city of St. Louis, then and there to answer the bill of complaint of George E. Ketchum, a citizen of the State of New York, filed against you on the 11th day of November, 1875. Hereof fail not.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, the 13th day of December, 1875. Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.]

M. M. PRICE, *Clerk*,
By A. P. SELBY, *Deputy*.

23 MEM.—The defendants to enter their appearance in this suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken pro confesso.

M. M. PRICE, *Clerk*,
By A. P. SELBY, *Deputy*.

Upon which said subpœna in chancery the marshal made his return in words and figures as follows:

UNITED STATES OF AMERICA,
Eastern District of Missouri, set;

The within-named Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett, and Luther C. Clark cannot be found within the eastern district of Missouri. I have served this subpœna on the within-named Atlantic & Pacific R. R. by leaving a copy with D. R. Garrison, vice-president of said road; on the Pacific Railroad by leaving a copy of this subpœna with James Baker, attorney for said road, he being the only officer of said road that could be found, and by leaving a copy of this subpœna with Rufus J. Lackland, James Baker, and one for Dwight Durkee with his wife, at his residence in the city of St. Louis, in the eastern dist. of Missouri, on the 13th day of December, A. D. 1875.

H. W. LEFFINGWELL,
24 *United States Marshal, Eastern District of Missouri,*
By JAMES B. GEGGIE, *Deputy.*

25 And afterwards, on the 31st day of December, 1875, the following proceedings were had in said cause, to wit:

GEORGE E. KETCHUM, COMPLAINANT,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

This day come defendants Rufus J. Lackland and Dwight Durkee, by A. M. Gardner, esquire, their solicitor, and enter their appearance herein.

And afterwards, on the 8th day of January, 1876, the following proceedings were had in said cause, to wit:

GEORGE E. KETCHUM, COMPLAINANT,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

This day comes the complainant, by James O. Broadhead, esquire, his solicitor, and shows to the court that Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett, and Luther C. Clark are not inhabitants of nor found within this district, and that they have not voluntarily entered their appearance herein; and on motion of said solicitor it is ordered that said absent defendants be, and they are hereby, directed to appear at the clerk's office of this court, on or before the first Monday of February next, and plead, answer, or demur to the complainant's bill herein.

26 It is further ordered that a certified copy of this order be served on said absent defendants in the manner required by the rules of this court for the service of other process.

And afterwards, to wit, on the 8th day of January, 1876, the following motion for leave to defend was filed in said cause by Thomas P. Akers, to wit:

In the United States circuit court for the eastern district of Missouri.
In equity.

GEORGE E. KETCHUM, PLAINTIFF,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

Now comes Thomas P. Akers, and shows and says that he is a stockholder in the Pacific Railroad, and owns one hundred shares of the capital stock of said road; that he is informed and believes, and upon information and belief alleges the fact to be, that the above-entitled cause for the foreclosure of the third-mortgage bonds of the Pacific Railroad was filed by the consent of the officers of said Pacific Railroad; that the officers and a number of the directors, being themselves interested in the third-mortgage bonds of said railroad, and interested in obtaining possession of the said road under said bonds, do not intend to resist the foreclosure of said mortgage, or make any resistance or defence to said suits, as will appear from the sworn statements of the attorney, director, and said officer of said Pacific Railroad, filed herewith in support of this motion.

Your petitioner further shows and says that, as a stockholder, he never gave his sanction or consent to the issuing of said third-
27 mortgage bonds; that he is informed and believes, and upon information alleges the fact to be, that the pretended consent of some of the stockholders thereto was obtained by false and fraudulent pretences by some of the officers and directors of the said Atlantic & Pacific Railroad Company, and Pacific Railroad Company.

That your petitioner is informed by counsel learned in the law, that *their* exists a good and valid defence against this suit of foreclosure; that unless he is permitted to make answer and defend against said bill, he will be greatly damaged in his interests as a stockholder in said road.

Wherefore your petitioner moves and prays for leave to be granted to him by this honorable court to come and defend in said above entitled cause.

THOMAS P. AKERS.

HILL & BOWMAN,
Solicitors for Petitioner.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Thomas P. Akers, deponent, being duly sworn, on oath says: That he has read the above and foregoing bill, and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters which are stated therein on information and belief, and as to those matters this deponent believes them to be true; and deponent further says, that unless the motion as prayed be granted and leave given to defend as asked his interests will be greatly endangered.

THOS. P. AKERS.

Subscribed and sworn to before me this 8th day of January, 1876.

C. M. WARD,
U. S. Commissioner, Eastern District of Missouri.

And afterwards, on the 7th day of February, 1876, the following answer and cross-bill of Thomas P. Akers was filed by leave of court.

(Which is omitted for printed record, because the amended answer and cross-bill contains averments which is given page of this record.)

28 And afterwards, on the 7th day of February, 1876, the Pacific Railroad filed the following answer to the bill of complainant herein:

In the circuit court of the United States in the eastern district of Missouri. In equity.

GEORGE E. KETCHUM
vs.
THE PACIFIC RAILROAD, THE ATLANTIC & Pacific Railroad Company, James Baker, Rufus J. Lackland, et al.

And now on this day comes the Pacific Railroad, and for a separate answer to the bill of complaint in this case says: True it is the said Pacific Railroad is a corporation, created under and by virtue of the laws of the State of Missouri, and that the said Atlantic & Pacific Railroad Company is a corporation created under and by virtue of the act of Congress, in said bill mentioned.

It also states that it is true that it made and delivered to the defendants Uriel A. Murdock, James Punnett, and Luther C. Clark the mortgage or deed of trust mentioned in said bill, dated July 15th, 1868, to secure bonds as therein described, to the amount of seven million dollars, and that the said mortgage contained the provisions and conditions therein mentioned, and the interest on the bonds therein mentioned has been duly paid.

It also admits that it made and delivered, as in said bill stated, to Edwin D. Morgan and Joseph Seligman, the mortgage or deed of trust therein mentioned, to secure the bonds therein mentioned, and that said mortgage contained the provisions and conditions therein mentioned;

29 that the whole amount were issued and sold, and that there are now outstanding the amount thereof, in said bill mentioned, and that the interest thereon has been duly paid.

It also admits that it is true that it made the mortgage therein mentioned to Rufus J. Lackland and Dwight Durkee, dated April 19th, 1872, to secure bonds, amounting in the aggregate to eight hundred thousand dollars, dated May 1st, 1872, of the description in said bill mentioned, and that said mortgage contains the provisions and conditions therein mentioned.

It also admits that it constructed the railroad therein mentioned, together with the side tracks, depots, engine-houses, and all the other appurtenances, and purchased the real estate in said bill mentioned.

It also admits that it made and delivered to Jesse Seligman, and James Baker, the mortgage, or deed of trust therein mentioned, dated October 1st, 1873, upon the property therein mentioned, to secure the bonds therein mentioned, and that said mortgage contained the provisions therein mentioned, and that said bonds are still outstanding, and the interest thereon has been duly paid.

This defendant also admits that it executed, made and delivered to the defendants, Henry F. Vail, and James D. Fish, the mortgage or deed of trust in said bill mentioned, dated July 10th, 1875, by which it mortgaged to them, for the trust therein mentioned, all the property and franchises therein described, to secure the bonds in said bill mentioned,

denominated third-mortgage bonds; and that said mortgage and bonds contained the provisions and conditions, and was issued for the purpose in said bill mentioned; and that a demand of the payment of the interest due thereon as alleged was duly made and the payment refused.

This defendant further admits, that it was the owner and lessee of the several railroads mentioned in said bill, and that at the time therein mentioned it leased, transferred, and assigned all the railroads owned by it and leased to it to the said Atlantic & Pacific Railroad Company, in the manner mentioned in said bill, and that the said last-mentioned company took possession of the said several railroads at the time mentioned in said bill, and have continued to manage and
30 operate the same since that time. They also admit, that since the date of said lease, the said Carondelet Branch Railroad has been constructed, and additional improvements and the purchase of additional rolling-stock have been from time to time made, since the date of said lease, as in said bill stated.

This defendant also states, that it is true the said Atlantic & Pacific Railroad Company, by the term of said lease, agreed to pay the interest on all the mortgage bonds theretofore issued, and to pay the dividends on the stock of the Pacific Railroad, as in said bill mentioned, and that default was made in the payment thereof, as therein stated.

It is also true, that in pursuance of said lease, obligations in various forms for the payment of money were from time to time issued by the Atlantic & Pacific Railroad Company in the name of the defendant, and for the payment of which this defendant is liable, and that it is also liable to pay the principal and interest of said third-mortgage bonds to Vail and Fish.

It is also true, that the said Atlantic & Pacific Railroad Company has made default in the payment of interest upon its bonds, secured by mortgages on the property originally owned by it, before the making of said lease, and has become embarrassed by floating debts to a very large amount, and has been unable to pay the dividends aforesaid, and the interest due November 1st, 1875, on the third-mortgage bonds aforesaid.

It is also true, that the interest upon the first and second mortgage bonds herein mentioned has been regularly paid as the same became due, and that the premises conveyed by said mortgage is abundant security for the first two mortgages as they mature.

This defendant, further answering, says: that the execution and delivery of the said third-mortgage bonds, and the mortgage to secure the same, was done in good faith, and for legal and proper purposes, without any fraud or malfeasance on the part of the board of directors or the stockholders of said company in the issue thereof, and constitute a legal and binding obligation on the part of this defendant to pay the same. But it says, that it is informed that a portion of said stockholders claim that they are fraudulent and void, and that the directors of this defendant are guilty of fraud in issuing the same.

31 Therefore this defendant asks this honorable court to ~~prevent~~ fraud any of the stockholders aforesaid to become a party defendant to this suit, upon a proper showing, and make such defence in the premises as they may see proper.

In witness whereof the said Pacific Railroad Company has caused these presents to be signed by James Baker, its attorney, and John L.

Dearborn, its secretary, and its corporation seal to be hereunto affixed this 7th day of February, 1876.

[SEAL.]

JAMES BAKER,
Att'y for said Company.

J. L. DEARBORN, *Sec.*

On said 7th day of February, 1876, the following further proceedings were had in said court, to wit:

GEORGE E. KETCHUM, COMPLAINANT,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

Now comes defendants, Henry F. Vail and James D. Fish, by Noble & Orrick, their solicitors, and enter appearance herein. Also come defendants James Baker, Jesse Seligman, Ed. Morgan, Joseph Seligman, Uriel A. Murdock, and Luther C. Clark, by James Baker and Noble & Orrick, their solicitors, and enter their appearance herein, and by leave of court take until next rule day to plead herein.

And afterwards, on the 16th day of February, 1876, C. K. Garrison and others filed their petition to be made parties complainants, which said petition is as follows, to wit:

32 In the circuit court of the United States for the eastern district of Missouri.

GEORGE E. KETCHUM, COMPLAINANT,
vs.
THE PACIFIC RAILROAD, THE ATLANTIC & Pacific Railroad Company, James Baker, Rufus J. Lackland, Dwight Durkee, Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett, and Luther C. Clark, respondents.

To the honorable the judges of the circuit court of the United States for the eastern district of Missouri:

Your petitioners, Cornelius K. Garrison and James Seligman, citizens of the State of New York, and Thomas W. Pierce, a citizen of the State of Massachusetts, respectfully represent: that they are the holders and owners of the third-mortgage bonds referred to and described in the bill of complaint in the above-entitled cause, as follows, to wit, your petitioners, Cornelius K. Garrison, holds and owns fourteen hundred (1,400) of said bonds, as will appear by affidavit herewith filed; James Seligman holds and owns three hundred and forty-seven (347), and Thomas W. Pierce holds and owns fifty (50) of said bonds, all of which said bonds are dated July 10th, 1875, and secured by a mortgage or deed of trust made to Henry F. Vail and James D. Fish, trustees, dated July 10th, 1875, and particularly described in said bill of complaint.

And your petitioners, upon information and belief, state that
33 the allegations of said bill of complaint, and the matters and facts in said bill contained and stated, are true.

And to the end that your petitioners may be protected in their interest in the said third mortgage and in their said bonds by them held and owned, as aforesaid, and secured by said mortgage, as aforesaid, they respectfully pray that they may be made parties to the proceedings in said cause, and that they may be joined with the said George E. Ketchum as parties complainant therein, and be permitted to prosecute said suit with the said Ketchum and other owners of the said third *third* mortgage bonds who may desire to join as complainants herein.

And your petitioners hereby join the said Ketchum in his prayer for the relief, by him, the said Ketchum, asked for in said bill of complaint, and for such other and further orders and decrees of this court as may, in view of the allegations of said bill of complaint, may seem meet and proper.

CLINE, JAMISON & DAY,
Att'ys for C. K. Garrison.
GROVER & ELLIS,
Att'ys for James Seligman and Thos. W. Pierce.

And afterwards, on the 24th day of February, 1876, the following further proceedings were had in said cause, to wit:

GEORGE E. KETCHUM, COMPLAINANT,
vs.
PACIFIC RAIROAD ET AL., DEFENDANTS.

Now comes Thomas P. Akers, by Messrs. Hill & Bowman, his solicitors, and by leave of court files a printed copy of his answer and
34 cross-bill herein, subject, however, to have the same struck from the files on motion of adverse parties hereto, the original answer and cross-bill to remain on file.

Ordered that this cause be set down for hearing on Monday, March 20th next.

And afterwards, on the 10th day of March, 1876, the complainant filed the following motion, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States for said district. In chancery.

GEORGE E. KETCHUM
vs.
THE PACIFIC RAILROAD ET AL.

To the judge of said circuit court:

Now, at this day comes the said George E. Ketchum, complainant in the foregoing bill, and moves the court for an order, that the answer and cross bill of Thomas P. Akers be withdrawn from the files of this court.

1. Because said answer and cross-bill were filed without leave of the court.

2. Because the said Thomas P. Akers is not a party defendant in the above-entitled cause, nor authorized to appear in said cause as a party thereto.

JAS. O. BROADHEAD,
Sol. for Complainant.

35 And afterwards, on the 25th day of March, 1876, Peter Marie and others filed the following petition to be made parties defendant herein, leave of court being given therefor.

In the circuit court of the United States for the eastern district of Missouri.

GEORGE E. KETCHUM, COMPLAINANT,
vs.
THE PACIFIC RAILROAD AND OTHERS, DEFENDANTS.

Your petitioners, Peter Marie, Frank A. Otis, Robert L. Cutting, jr., and James D. W. Cutting, who are citizens of the city and State of New York; George R. Fearing, of the city of Newport, and State of Rhode Island, respectfully represent, that the said Peter Marie is the owner of one hundred shares of the capital stock of said railroad company; that the said Frank A. Otis is the owner of over one hundred shares of the capital stock of said company; that said George R. Fearing is the owner of over two hundred shares of said stock, and that Robert L. and James D. W. Cutting, composing the firm of R. L. Cutting, jr., & Co., are the owners of over five hundred shares of said capital stock; that Thomas P. Akers, a stockholder of said company, has filed his answer and cross-bill to the bill of complaint filed by complainant in this case, and in said answer and cross-bill avers that he files the same, not only for his own benefit as such stockholder, but for the benefit of all other holders or owners of the shares of said capital stock who may come in and contribute to the cost and expense necessary to the prosecution of the same.

Your petitioners respectfully pray that they may be allowed to come in and defend the said suit and be made co-defendants herein with
36 the said Thomas P. Akers, and be joined with him as parties defendant herein, with such other stockholders as may desire to join them as such defendants.

The said petitioners further pray, that they may be allowed to adopt the said answer and cross-bill as their answer and cross-bill in this cause, and to join with him in his prayer for relief in the premises.

R. L. CUTTING, JR., & CO.
FRANK A. OTIS.
GEORGE R. FEARING.
PETER MARIE.

And afterwards, on the 3d day of April, 1876, the following further proceedings were had in said cause, to wit:

GEORGE E. KETCHUM, COMPLAINANT,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

Now come James Seligman and Thomas W. Pierce, by Messrs. Grover & Ellis, their solicitors, on whose motion it is ordered that said Seligman and Pierce have leave to join as complainants with George E. Ketchum herein.

And again, on said 3d day of April, the following further proceedings were had in said cause, to wit:

37 *Appointment of receiver.*

GEORGE E. KETCHUM, PLAINTIFF,
vs.
THE PACIFIC RAILROAD, THE ATLANTIC & PACIFIC Railroad Company, James Baker, Rufus J. Lackland, Dwight Durkee, Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, and Luther C. Clark, defendants.

This cause having this day come on for hearing on the application and motion of the complainant for the appointment of a receiver or receivers of the property, effects, rights, and franchises mentioned in said bill of complaint herein:

And the same having been duly heard by solicitors James O. Broadhead, esq., of counsel for complainant, and James Baker, esq., of counsel for the Pacific Railroad, the Atlantic & Pacific Railroad Company, and for himself, and A. M. Gardner, esq., of counsel for Rufus J. Lackland and Dwight Durkee; and Messrs. Noble & Orrick, of counsel for Henry F. Vail and James D. Fish; Thomas J. Portis, esq., of counsel for Jesse Seligman, E. D. Morgan and Joseph Seligman, and appearing and assenting to this order, and the court being sufficiently advised in the premises:

It is ordered, adjudged, and decreed that Oliver Garrison, John H. Beach and Joseph L. Stephens, of the State of Missouri, be, and
38 they are hereby appointed receivers in this case, with full power to enter and take possession of the railroad of said "Pacific Railroad" (corporation), in the State of Missouri and elsewhere, and all its branches and leased lines, together with all side-tracks, switches, station-houses, and all other houses, rights of way and grounds in use, or necessary or convenient to be used in operating said roads; also, all machine shops, machinery, workshops, tools, and implements, belonging to said company; and all engines, cars, and rolling stock of every kind owned and belonging to said company or leased by it, and all supplies, fuel, iron, and material owned and belonging to said company, and all money, credits, choses in action, and all other claims and demands of whatever nature to which it is entitled, and all other property, real and personal, of whatever nature and description, and wherever situated, belonging to said company, and the same to hold and use under this or such further orders as may from time to time hereafter be made by this court; and that, until otherwise ordered, the said receivers shall operate all of said roads and branches throughout the whole extent thereof according to the usual course of business thereof, and to the best advantage for the interest of all parties concerned, and generally to maintain said roads, their rolling-stock, fixtures, and appurtenances in good order and in an efficient and safe condition; and for that purpose to purchase, for cash or on credit, or partly for both, material and supplies whenever necessary. And as the court finds that the lease of the Pacific Railroad to the Atlantic & Pacific Railroad Company, entered into on the 29th day of June, 1872, did, by the provisions of said deed of lease, and by the action of the respective companies, parties thereto, terminate on the 7th day of March, 1876; and that since that time the earnings and receipts from said respective roads properly and rightfully inured to the benefit of the company owning the same:

It is ordered that all moneys now due for or on account of the busi-

ness transacted by or over the said Pacific Railroads, and the leased lines and branches pertaining thereto, be paid to and received by the receivers herein appointed, and that they have full power to collect and receipt for the same; and that the books and accounts in the
39 hands of the said receivers of said Atlantic & Pacific Railroad, heretofore appointed as aforesaid by this court, of all the business and other transactions in respect to the operation and management of the said Pacific Railroad, its leased lines and branches, be subject at all times to the inspection and free use of the receivers hereby appointed, and their agents and servants; and that they be permitted to take copies of all or such parts thereof as they may deem proper.

And it is further ordered that the receivers hereby appointed shall, out of the earnings of the railroads under their charge, or out of any other money that may come into their hands as such receivers, pay, at maturity, such parts of any certificates of indebtedness as may have heretofore been issued by the receivers of said Atlantic & Pacific Railroad, under the orders of this court, to pay any indebtedness on account of said Pacific Railroad, including the interest of its bonded indebtedness, or for the purchase of supplies that have been used on the same; and that they may have power to purchase and in like manner pay for any or all the supplies, material and fuel on the lines of the roads under their control heretofore purchased by said Atlantic & Pacific Railroad Company, which are liens thereon, or which have been purchased by the receivers of said Atlantic & Pacific Railroad, and justly chargeable to said Pacific Railroad and its branches and leased lines.

It is further ordered that Henry F. Vail and James D. Fish, the trustees created by and mentioned in said third mortgage on said Pacific Railroad, be, and they are hereby, authorized to exchange such of the bonds secured by said mortgage as may now be in their hands for that purpose for such of the income and improvement bonds as have not yet been exchanged for as provided in said mortgage deed; and that, in case of their failure or refusal so to do, the receivers hereby appointed have full power and authority to make such exchange, reserving all rights and questions concerning the validity of said bonds and mortgage.

It is further ordered that said receivers be, and they are hereby, authorized and empowered out of the property and earnings of the said Pacific Railroad to redeem any and all other bonds or stocks be-
40 longing to the said Pacific Railroad, which have heretofore been pledged or hypothecated to secure any of its indebtedness, which in their judgment and discretion will be beneficial to the estate in their charge to pay.

And the said receivers are hereby authorized and empowered to employ and pay all such agents, servants, laborers, clerks and assistants as in their direction may be necessary under them to carry this order into effect with economy and prudence, and to make, enter into and perform all necessary contracts for the purchase of supplies; and for the prosecution of said business they are hereby further ordered and required to keep and cause to be kept in regular and systematic order strict and regular accounts of all the business of said trust in their hands, and of the daily receipts and disbursements of money, so as to keep distinct and separate the receipts and disbursements of the roads aforesaid, earned and expended by and on the Pacific Railroad and the lines heretofore leased to that company, and so as to show the earnings and expenditures by and on account of each leased line and branch road on the part of said road lying in the State of Kansas, and elsewhere out

of the State of Missouri, and showing the mode of division of through business passing from and over two or more of said lines, and showing the items in detail.

The said receivers are hereby required to file in the office of the clerk of the court, within the first twenty days of each month, a detailed account of all their receipts and expenditures for the preceding month; and they shall also file a detailed statement of all materials purchased and the price paid or to be paid for the same.

The receivers shall also pay in like manner, out of the property and earnings of each road, all sums which are now or may hereafter become due for taxes upon any of the property of such road coming to their hands as receivers; and also all interest or principal due or to become due upon any purchase of property which comes to their hands as receivers, and which, in the judgment of the said receivers, it will be beneficial to the estate in their possession to pay.

They are hereby further authorized and empowered to appropriate and apply the property, money and effects aforesaid, vested in
41 them as aforesaid, with the current earnings of the said roads and business, so far as the same may be necessary to the objects and purposes of this trust, under the direction of this court, for the use and benefit of such parties as may be found entitled thereto; and if, after making all payments hereinbefore authorized, there shall remain in the hands of said receivers, at any time, any surplus moneys, they shall report the same to this court as to the disposition of the same.

And the said receivers are further directed to proceed with all practicable dispatch, after they enter upon the discharge of their duties, to take an inventory of all and singular the property and effects of every description of the respective roads, which may come to their possession or under their control, in virtue of this order, noting the present condition, and to file such inventory in this court.

And the receivers are further empowered in their discretion to remove any of the officers or employees of said railroad company, other than the president and directors thereof, and such other officers as pertain to and *and* are necessary to maintain the corporate organization; but notwithstanding this reservation, the entire management of said road, and the power to appoint and remove all superintendents, engineers, and other agents and employees, in any way concerned in operating the said road, shall belong to the receivers. The receivers, acting in pursuance of this, or any order or decree of this court herein, in good faith, shall not be individually liable for any breach of any contract entered into by them as such receivers, or for the fulfillment of any obligation entered into by them as such receivers, or for any injury to the person or property of the parties, or of third persons, or for the faults or negligence of their subordinates; but the property, moneys and effects that shall, at any time, be in their hands as such receivers, shall be bound for all such breaches or wrong, and may, from time to time, as may be necessary, be applied in such manner as this court shall direct.

It is further ordered that each of said receivers, before entering on their duties as aforesaid, shall, within ten days from the date of this order, enter into a bond, with two or more securities, to the acceptance of this court or one of the judges thereof, in the penal sum of five
42 hundred thousand (500,000) dollars, conditioned for the faithful performance of all duties enjoined upon them.

And it is further ordered that each of said receivers shall without

delay take an oath before a judge or a clerk of this court, faithfully to perform his duties as receiver in this cause.

It is further ordered that the said receivers be authorized to institute and prosecute and defend any and all suits which, in their judgment, may be necessary to protect the property and interests intrusted to their charge, and to defend all suits which may be brought against them as receivers, or against the Pacific Railroad, and to execute all bonds or obligations which it may be necessary or proper to be executed in the prosecution or defense of such suits, and to do and perform all matters and things necessary in the prosecution or defense of such suits.

It is further ordered that said receivers be authorized to pay all indebtedness of said Pacific Railroad heretofore contracted for supplies, material, and fuel used on said Pacific Railroad, its leased lines and branches, which are a lien thereon, and which they may deem just and proper; and if at any time there is not sufficient money in their hands, arising from the earnings of said railroad and other sources, that they have authority and power to borrow the same, not exceeding $300,000, and issue their certificates therefor, payable at such times as they may deem proper, not to exceed six months from the date thereof, to bear interest at a rate not exceeding eight per cent. per annum, which, if not paid out of said receipts prior to any foreclosure of the mortgage sued on in this case, shall be paid out of the proceeds of the sale of the property so mortgaged when made.

It is further ordered that the receivers hereby appointed shall pay all debts and obligations of every nature and kind heretofore contracted by the said receivers of the Atlantic & Pacific Railroad since their appointment, for and on account of the said Pacific Railroad, and that none of the equities of any of the parties in interest shall be affected thereby, but the determination of the same is hereby reserved for the future action of this court; and that, for the purpose of enabling this court to properly settle their respective equitable rights, the matter is referred to S. D. Thompson, a master in chancery, to take an ac-
43 count between said Atlantic & Pacific Railroad Company and said Pacific Railroad.

It is further ordered that said receivers have power and authority to pay to the county of St. Louis, and are hereby directed to pay the solicitor of said county, the amount of interest now due to said county, to wit, $41,000, including March, 1876, for and on account of the interest now due on the indebtedness to said county for $700,000 of its bonds loaned by it to said railroad company. But such payment shall not in anywise be construed into recognition or admission of any right of lien in behalf of said county on the income or property of said railroad company.

It is further ordered that the receivers hereby appointed shall keep a record of their proceedings and of all orders made by them, that in case of the absence of one of their number a majority may act, but any one who may dissent may have his objection noted on the record, and may by petition refer the matter to the court for its opinion and order thereon. Such dissent, when entered of record, shall have the effect of relieving the receiver so dissenting, and his securities, from all liability on account of such order or act.

It is further ordered that the cross-bill of Thomas P. Akers heretofore filed be taken from the files of the court, as the same is found to be in defective form.

It is further ordered that leave be given to Thomas P. Akers as a stockholder, and the county of St. Louis, claiming to be a stockholder

or trustee for stockholders, to file an amended cross-bill herein within thirty days, upon giving security for costs in the sum of $5,000.

It is further ordered that leave be granted to the county of St. Louis to make answer to the bill of foreclosure in this cause and defend against the same.

It is further ordered that each of the receivers aforesaid be paid for his services as such receiver at the rate of five thousand dollars per year, and all necessary expenses incurred by him while away from his home in the discharge of his duties as such receiver.

It is further ordered that all the receivers give immediate attention to the settlement and payment of all just and proper taxes assessed upon the said road and its properties.

41 And afterwards, on said 3d day of April, 1876, the following further proceedings were had in said cause, to wit:

GEORGE E. KETCHUM, COMPLAINANT,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

Now comes C. K. Garrison, by Messrs. Cline, Jamison, & Day, his solicitors, on whose motion leave is granted said C. K. Garrison to join with complainant in the prosecution of this cause.

Also come Henry F. Vail and James D. Fish, by Messrs. Noble & Orrick, their solicitors, on whose motion leave is granted said Vail and Fish until the first Monday in June, 1876, to plead, answer, or demur, or take further action in this case.

And afterwards, to wit, on the 25th day of April, 1876, the said Thomas P. Akers, by leave of court, files amended answer and cross-bill herein, and which is in words and figures as follows, to wit:

45 *Answer and cross-bill.*

Circuit court of the United States, eastern district of Missouri. In equity.

GEORGE E. KETCHUM
vs.
PACIFIC RAILROAD ET AL.

To the honorable the judges of the circuit court of the United States for the eastern district of Missouri, in the eighth circuit, sitting in equity:

By leave first had and obtained, now comes Thomas P. Akers and the county of St. Louis, and presents this amended answer and cross-bill in the above-entitled cause, and humbly complaining showeth unto your honors:

1st. That said county of St. Louis is a municipal corporation and political subdivision of the State of Missouri, and as such is capable of suing and being sued, pleading and being impleaded.

2d. And your orators show that said county of St. Louis, under and by virtue of the provisions of an act entitled "An act to authorize the formation of railroad associations, and to regulate the same," duly passed by the legislature of the State of Missouri, and approved February 14, 1853, did on the 13th day of May, 1854, subscribe to the capi-

tal stock of said Pacific Railroad $1,200,000, and thereafterwards did make full payment for the same; that by the provisions of said act of February 14th, 1853, it was provided that upon the making of such subscription to any railroad company by any county or city, as
46 in said act provided for and contemplated, then "such county or city shall thereupon become like other subscribers to such stock;" that the said county of St. Louis, acting under the provisions of said act, did, on Saturday, May 13th, 1854, adopt the following order, viz:

Ordered, that whereas this court has been satisfied by the recent election held in St. Louis County, that it is the sense of the taxpayers thereof that this court shall subscribe to the capital stock of the Pacific Railroad (the same being that which commences in the city of St. Louis and runs westward by way of Jefferson City, and thence along the best and most practicable route through the county of Johnson, and terminating at any point in Jackson County, as mentioned in the eleventh section of an act of the general assembly of Missouri, entitled "An act to accept a grant of lands made to the State of Missouri by the Congress of the United States, to aid in the construction of certain railroads in this State, and to apply a portion thereof to the Pacific Railroad," approved December 25, 1852) one million two hundred thousand dollars, this court does now hereby subscribe one million two hundred thousand dollars to the capital stock of said Pacific Railroad. And it is further ordered that David Thomas, esq., presiding justice of this court, be, and he is hereby, appointed, authorized, and instructed to subscribe the said sum of one million two hundred thousand dollars to the capital stock aforesaid, in such manner as shall be required by the charter and by-laws of said Pacific Railroad, and to execute and deliver, in that behalf, any instrument or instruments of writing that may be necessary and sufficient, as aforesaid, to show that the said subscription of one million two hundred thousand dollars to the capital stock of said Pacific Railroad has been made by this court. It is further ordered that said *said* subscription, made or to be made as aforesaid, is in virtue of the powers granted in and the limitations and restrictions imposed by an act of the general assembly of the State of Missouri, entitled "An act to authorize the formation of railroad associations and to regulate the same," approved February 24th, 1853.

47 That afterwards, on June 5th, 1854, the county court of St. Louis County entered the following order in the premises:

"David Thomas, esq., the presiding justice of this court, having, under the order of this court of the 13th day of May last, subscribed on the books of the Pacific Railroad Company the sum of twelve hundred thousand dollars, the court now approve said subscription and the term thereof, and order that a copy thereof be spread upon the record of the court as follows, to wit:

"STATE OF MISSOURI,
"*City and County of St. Louis:*

"MAY 31, 1854.

"In conformity with an order of the county court of St. Louis County, made and of record of the 13th day of May, 1854, the undersigned, duly authorized under the order aforesaid, doth hereby subscribe for and in behalf of the said county of St. Louis, in virtue of the power granted and the limitation and restriction imposed by the act of the general as-

sembly of the State of Missouri entitled 'An act to authorize the formation of railroad associations and to regulate the same,' approved February 24, 1853, twelve thousand shares of one hundred dollars each to the stock of the Pacific Railroad, amounting to the sum of twelve hundred thousand dollars, and agreed to pay the same in four annual instalments; said instalments to be raised by a levy of a special tax. The first instalment of three hundred thousand dollars to be paid on or before the 15th day of December, 1854; the second instalment of three hundred thousand dollars on or before the 15th day of December, 1855; the third instalment of three hundred thousand dollars on or before the 15th day of December, 1856, and the fourth and last instalment of the same amount on or before the 15th day of December, 1857."

And then afterwards, on the 20th October, 1854, the following order was made by said court, viz:

It is ordered, that for the purpose of paying the instalment of
48 three hundred thousand dollars due on the 15th day of December, 1854, of the twelve hundred thousand dollars subscribed by the court to the capital stock of the Pacific Railroad on the 31st day of May, 1854, a special tax of seven-tenths of one per cent. be levied and collected upon all property and taxables within the city and county of St. Louis made taxable by law for State and county purposes for the year eighteen hundred and fifty-four.

And thereafterwards, on the 13th of November, the said court adopted, upon the application of the Pacific Railroad Company, the following order, viz:

Upon the application of the Pacific Railroad Company it is ordered by the court that for the purpose of paying the instalment of three hundred thousand dollars, made payable on the 15th day of December, 1855, of twelve hundred thousand dollars subscribed by the court to the capital stock of said railroad, on the 31st day of May, 1854, and in anticipation of the collection of the railroad tax for that year, bonds of the county of St. Louis, in sums of one thousand dollars, and to the amount of two hundred and twenty-five thousand dollars, issuse to said railroad company; said bonds to be signed by the presiding justice of this court, attested by the clerk under the seal of the court; to be dated the 15th instant, and made payable on the 1st day of January, 1856, with interest at seven per cent. per annum from the 1st day of January, 1855, for which interest coupons signed by the clerk shall be affixed, payable one on the 1st of July, 1855, and one at maturity of the bond. The principal and interest of said bonds to be made payable at the Phœnix Bank, New York, the said railroad company agreeing to pay all interest on said bonds, and the court reserving the right to apply a sufficiency of the tax aforesaid to be levied and collected for the year 1855, to the redemption and payment of said bonds.

And thereafterwards, on the 19th of December, 1854, it was by the county court of St. Louis County ordered that a warrant issued upon the treasurer in favor of the Pacific Railroad Company for one hundred and fifty thousand dollars, being on account of the $300,000 made payable on the 15th inst., according to the subscription made by the county to the capital stock of said company.

49 And thereafterwards, on the 8th of February, 1855, it was by the county court of said St. Lous County ordered that a warrant issue upon the treasurer in favor of the Pacific Railroad Company for one hundred thousand dollars, being a payment on the $300,000 due by

the county on the 15th day of December, 1854, according to the terms of the subscription by the county to the capital stock of said company.

That afterwards, on the 8th day of March, 1855, the following proceedings were had and orders made by said county court of St. Louis County, viz:

Upon the application of the Pacific Railroad Company, and it appearing that there is due from the county of St. Louis to the said company the sum of fifty thousand dollars, being the balance of the three hundred thousand dollars made payable on the 15th day of December last, according to the subscription made by the county to the capital stock of said company on the 31st day of May, 1854, it is ordered by the court that fifty bonds of the county, in sums of one thousand dollars each, to be dated April 1st, 1855, payable seven months after date, with interest at the rate of six per cent. per annum, in gold or silver, at the office of the county treasurer, in the city of St. Louis, to the president of the Pacific Railroad Company, or bearer, to be signed by the presiding justice of this court, countersigned by the clerk, with the seal of the court affixed, to be issued and delivered to said company in payment of said fifty thousand dollars.

And thereafterwards, on the 25th of April, 1855, the following proceedings were had, and orders made by said county court of St. Louis County, viz:

Upon the application of the Pacific Railroad Company, it is ordered by the court that for the purpose of paying the instalment of three hundred thousand dollars, made payable on the 15th day of December, 1856, of the twelve hundred thousand dollars subscribed by the court to the capital stock of said railroad on the 31st day of May, 1854, and in anticipation of the collection of the railroad tax for that year, bonds of the county of St. Louis, in sums of one thousand dollars, and to the amount of one hundred and eighty thousand dollars, issue to said company, and in order to pay the instalment of three hundred thousand dollars of the said subscription made payable on the 15th day of December, 1857, and in anticipation of the collection of the tax for that year, bonds of the county of St. Louis, in sums of one thousand dollars, and to the amount of one hundred and seventy thousand dollars issue to said company, said bonds to be signed by the presiding justice of this court, attested by the clerk under the seal of the court, all to be dated May 1st, 1855, with coupons attached for the payment of the interest, at seven per cent. per annum, semi-annually; such coupons to be signed by the clerk of this court, principal and interest of said bonds to be made payable at the Phœnix Bank of New York; said one hundred and eighty thousand dollars to be made payable on the first day of January, 1857, and said one hundred and seventy thousand dollars to be made payable on the first day of January, 1858; the said railroad company agreeing to pay all interest on said bonds, and the court reserving the right to apply a sufficiency of the tax to be collected for the year 1856 and 1857 to the payment of said bonds, and all interest not punctually paid by said company, said interest to run from July 1st, 1855.

And thereafterwards, on the 28th of August, 1855, the following proceedings were had, and order made by said county court of St. Louis county, viz:

Upon the application of the Pacific Railroad Company, it is ordered by the court that for the purpose of paying a balance of three hundred thousand dollars, made payable on the 15th day of December, 1856, of the twelve hundred thousand dollars subscribed by the court to the

capital stock of said railroad on the 15th day of May, 1854, and in anticipation of the collection of the railroad tax for that year, bonds of the county of St. Louis, in sums of one thousand dollars, and to the amount of one hundred and twenty thousand dollars, issue to said company, and in order to pay the balance of said instalment of three hundred thousand dollars of said subscription made payable on the 15th day of December, 1857, and in anticipation of the collection of
51 the tax for that year, bonds of the county of St. Louis, in sums of one thousand dollars, and to the amount of one hundred and thirty thousand dollars, issue to said company, said bonds to be signed by the presiding justice of this court, attested by the clerk under the seal of the court, all to be dated September 1st, 1855, with coupons attached for the payment of the interest at the rate of seven per cent. per annum, semi-annually, such coupons to be signed by the clerk of this court, principal and interest of said bonds to be made payable at the Phœnix Bank, New York; said one hundred and twenty thousand dollars to be made payable on the first day of January, 1857, and said one hundred and thirty thousand dollars to be made payable on the first day of January, 1858; the said railroad company agreeing to pay all interest accruing on said bonds, and the court reserving the right to apply the railroad tax collected for said years to the payment of said bonds; said interest to run from October 1st, 1855, and the first coupon on each bond to run three months.

That thereafterwards, on the 7th day of January, 1856, the county court of St. Louis County made its order directing a warrant to issue upon the treasurer of said county to the Pacific Railway Company for seventy-five thousand dollars, being the balance due said company on the instalment due on the 15th day of December last, according to the terms of the subscription made by the county to the capital stock of said company. That each and all of the foregoing orders so made as aforesaid were duly executed, and full payment made as aforesaid for said $1,200,000 stock of the Pacific Railroad, so subscribed for as aforesaid by the county of St. Louis. That pursuant to the provisions of said act of February 14th, 1853, the county of St. Louis levied a special tax for the larger portion of the stock subscription so made, and special tax receipts were issued to such of the taxpayers of the county of St. Louis as paid such tax. That by virtue of the provisions of said act, the holders of said tax receipts became entitled to receive from the county of St. Louis an amount of stock of said Pacific Railroad equal in amount to the tax receipts so held by such taxpayers. That there has been delivered to the taxpayers of St. Louis County, under the provisions of said act, $982,000 of said stock. That there remains $218,000 of
52 said original stock, the rightful property of the county of St. Louis, to be held in trust and faithfully cared for by the said county until the same shall be demanded by any taxpayers entitled thereto.

That among the privileges, as originally given to said county, was the privilege of voting all stocks so subscribed and paid for until the same should be issued to such taxpayers as were entitled thereto. But in violation of the said contract, the legislature of the State of Missouri, on the 14th of March, 1869, enacted the following provisions:

"The board of county commissioners (since changed to the county court for St. Louis County) shall meet on the days respectively fixed for the election of directors of the Pacific, Iron Mountain and North Missouri Railroads, and cast the vote of the county for suitable persons as directors of said several companies; but in counting said vote, the said

board shall not take into account, and shall not assume to represent, the shares of stock of the Pacific Railroad which the county court of St. Louis County, in behalf of said county aforesaid, in the year 1854, for which the taxpayers of St. Louis County have paid by a direct tax, and for which such taxpayers are entitled to certificates on presentment of their railroad tax receipts. Nor shall said board of county commissioners assume to represent the stock to be paid by a special tax subscribed to the Iron Mountain and North Missouri Railroad Companies after said subscription has been paid by a levy of the special tax, and the taxpayers are entitled to certificates."

And your orators aver that by means of the above illegal act (the same being in violation of contract previously entered into by the county of St. Louis and Pacific Railroad Company), the county of St. Louis has been prevented from voting or representing, as by its contract it was entitled to do, and has never by its vote sanctioned any of the illegal or fraudulent acts hereinafter stated and complained of, and has never received any of the dividends under the said pretended lease of June 29th, 1872, hereinafter referred to.

3d. And at all times, saving and reserving unto themselves all
53 benefits and advantages of exception which can or may be had or taken for answer thereto, or unto so much or such parts thereof as they are advised are material or necessary for them to make answer unto, answering saith: That they admit the allegation of complainant's said bill as the first mortgage of $7,000,000, secured by deed of trust, dated July 15th, 1868, as also the allegations of complainant's said bill as to the second mortgage of $3,000,000, secured by deed of trust, dated July 1st, 1871. These defendants further say that as to the real estate mortgage of $800,000 secured, as is alleged in said bill of complaint, by deed of trust dated April 19th, 1872, they have no knowledge or information sufficient to enable them to form a belief, and are not sufficiently advised to either deny or admit, but ask that the court will require from complainant strict proof of the allegations in complainant's bill concerning the same. And as to the said mortgage of $500,000 upon the Carondelet Branch, so called, secured, as is alleged by complainant, by mortgage or deed of trust, dated October 1st, 1873, they have no knowledge or information sufficient to enable them to form a belief, and are not sufficiently advised to either deny or admit, but ask that the court will require from complainant strict proof of the allegations of complainant's bill concerning the same.

That as to the said alleged mortgage to Henry F. Vail and James D. Fish, dated July 10th, 1875, by which it was attempted to convey all the property real and personal, rights, interests and franchises of the said Pacific Railroad, described in each of the four mortgages before mentioned, for the securing of $4,000,000 so-called third mortgage bonds, defendants say, that they as stockholders never consented thereto, and are informed and believe and have reason to believe, and upon information and belief charges the fact to be, that said alleged mortgage was fraudulently executed, and a pretended consent of a portion of the stockholders, the execution of the same was obtained through false and fraudulent pretences and representations, in this, to wit: That it was, as they are informed and believe, falsely stated and represented to the directors and stockholders of the said Pacific Railroad by the directors
of the Atlantic & Pacific Railroad Company, then in charge, as
54 lessees, of the Pacific Railroad, that a large amount of permanent improvements had been made on said Pacific Railroad—large and permanent improvements as to road-beds and bridges by said

lessees, and by reason of which the Pacific Railroad had become largely indebted therefor, and that such false representations were so made by verbal statements of the directors and officers of said Atlantic & Pacific Railroad Company, and also by means of printed circulars, caused to be issued by the said directors and officers, and circulated among said stockholders; that said representations so made were, as he is informed and believes, false and fraudulent in this, to wit: That no improvements had been made on said road by the Atlantic & Pacific Railroad Company of any kind, except such as were required by the terms and provisions of said lease of June 29th, 1872, to be made at the cost and expense of the said last mentioned company, lessees; in that no improvements had been made except such as were necessary to keep said road in as good condition as when received; and the false representations so made as aforesaid, were made for the purpose of securing the assent of the directors and stockholder' of the Pacific Railroad to said mortgage. That said mortgage was made, and so fraudulently executed in fraud of the rights of the bona fide unsecured creditors and all stockholders of said Railroad; that the directors of said Atlantic & Pacific Railroad Company, for the purpose of obtaining by foreclosure of said mortgage a title to said road, caused false and fraudulent representations to be so made. That the complainant in said bill as defendant is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, received all bonds now held by him with full information of the fraudulent issue of the same, and of the facts as hereinbefore stated and hereinafter set forth, and that said $4,000,000 bonds have been distributed, and at the time of the institution of this suit were held by said complainant Ketchum and the directors of said Atlantic & Pacific Railroad Company, for said company and for themselves and by their associates with full knowledge of the facts above stated and hereinafter recited.

And that the said C. K. Garrison, who has joined in the prosecution of said suit of foreclosure since the institution of the
55 same, and who by himself and associates now holds, owns,
55 and controls the greater portion of said third mortgage bonds, purchased the same at a nominal price, to wit, from twenty-eight to fifty cents on the dollar; purchased and now holds the same, with full knowledge of the facts hereinbefore and hereafter stated, and all parties now holding any of said third mortgage bonds, and who are seeking with complainant a foreclosure of same, hold the same with like knowledge and information, and have obtained the same speculatively for the purpose and intent of procuring possession of the Pacific Railroad freed from the rights of your orators and the stockholders and unsecured creditors. That prior to the time when said third mortgage was so executed, to wit, on the 29th June, 1872, the said Pacific Railroad executed a pretended lease to the said Atlantic & Pacific Railroad Company, upon certain terms and conditions in said lease mentioned, of the entire line of railroad then owned and operated by it, as will more fully appear by copy of said pretended lease filed herewith for the information of this honorable court, and made part of this answer. That under said pretended lease the said Atlantic & Pacific Railroad Company, on said 29th day of June, 1872, obtained possession of said Pacific Railroad and its appurtenances, and continued in full possession of same until about November 4th, 1875, and until receivers thereof were appointed by this honorable court. That under the terms of said lease, if the same were of binding force and effect, the Atlantic & Pacific Railroad Company agreed and covenanted to pay

all debts contracted for the keeping of said Pacific railroad in good and sufficient repair as a first-class railroad; that all of said indebtedness of said Pacific Railroad as the same existed on July 10th, 1875, in excess of the indebtedness existing June 29th, 1872, was in fact the indebtedness of said Atlantic & Pacific Railroad Company, not only by reason of said lease, if valid, but by reason of the same having been contracted by said last-mentioned company while in possession of said road under said pretended lease, and receiving its income, which was more than sufficient to pay all running expenses of the same, all interest on its mortgage debt, all taxes, and all indebtedness for improvements thereon contracted for by said Atlantic & Pacific Railroad Company.

56 That by reason of the foregoing facts the said mortgage or deed of trust of July 10th, 1875, was null and void and of no force and effect, and so known to be by said complainant and the parties receiving and now holding said third-mortgage bonds; that said parties paid but a nominal price for said bonds, knowing at the time of receiving same that they had been fraudulently issued in manner as aforesaid.

Defendants, further answering, state that the premises known as the Pacific Railroad are now earning, and for the last six years have earned annually, from $3,200,000 per annum to $3,700,000, which, after paying the taxes and operating expenses, have been amply sufficient to pay all interest upon all legitimate debts of the railroad company and a fair dividend to the stockholders. That the net earnings of said Pacific Railroad Company, according to the printed reports made by the defendants, the Atlantic & Pacific Railroad Company, and by Andrew Pierce and the other defendants, directors in said Atlantic & Pacific Railroad Company, are about thirty-eight per cent. of the gross earnings, or say from $1,216,000 to $1,406,000 per annum.

That the amount received by said Atlantic & Pacific Railroad Company, from and on account of the Pacific Railroad, from July 1st, 1872, to September 30, 1875, exceeded in amount $15,291,648. That at the time when said Atlantic & Pacific Railroad took possession of the Pacific Railroad, on June 29th, 1872, there was cash and other available assets on hand, mainly in bills receivable, nearly or quite sufficient to pay all the floating indebtedness of said Pacific Railroad. That if there was any deficiency it did not exceed more than about $250,000. That the bonded indebtedness of said road then existing amounted to only about $10,800,000, bearing interest at an average rate of less than seven per cent., excepting the debt due on account of $700,000 bonds of the county of St. Louis, which the road was bound and obliged to pay, together with interest at the rate of seven per cent. per annum.

That by the terms of said lease the said defendant, the Atlantic & Pacific Railroad Company, had no authority or right to encumber the *the* leased property, except for the purpose of paying the debts of said Pacific Railroad Company.

57 That the earnings and income of the Pacific Railroad Company, while in the possession of said Atlantic & Pacific Railroad Company, have been quite sufficient, and the petitioner avers, if properly administered, more than enough to pay the just and proper operating expenses, all accruing interest on the bonded debt due from said Pacific Railroad Company.

Defendants aver, upon information and belief, for that they have good reason to believe and so believe, that the proceeds of the $800,000 real estate bonds, issued as above described, on the 19th of July, 1872, and the $500,000 Carondelet Branch bonds, issued as above described, October 1st, 1873, were sufficient 'ample with which to pay for all permanent

improvements made by said Atlantic & Pacific Railroad Company upon the premises claimed.

Defendants therefor aver, upon information and belief, and charges the facts to be, that the issue of said $1,500,000 income bonds, September 1st, 1872, and the issue of said $2,000,000 of improvement bonds December 15th, 1874, by the defendants, were fraudulent and unauthorized, and not required by any legitimate and proper wants of the said Pacific Railroad Company, and the said issues of bonds were not for the use and benefit of said Pacific Railroad; that whatever benefit was derived from said issues of bonds inured to the said Atlantic & Pacific Railroad Company.

And defendants aver, upon information and belief, and charges the facts so to be, that said income and said improvement bonds were wrongfully issued by and at the request of said Atlantic & Pacific Railroad Company and its directors, and the defendants above-named, directors of said Pacific Railroad, in collusion with others to your petitioner unknown, for the purpose and with the intent of encumbering, conveying, and misappropriating the property of said Pacific Railroad Company, to the great injury of your petitioner and other stockholders of said company.

And complainant further says, that he is informed and believes, and upon information and belief alleges the fact to be, that the earnings of said Pacific Railroad since June 29, 1872, have been sufficient in
58 amount to pay all operating expenses and interest on its bonded debt then existing, and to pay in full its floating debt.

Your orator further states, that the construction of said Carondelet Branch, as he is informed and believes and charges, cost but $382,457.36; that on the 15th of October, 1873, a mortgage of $500,000 was issued, as aforesaid, and secured on said branch; that in addition thereto there was a real estate mortgage issued as aforesaid, on the 19th of July, 1872, securing $800,000 real estate bonds, and that it is, as your orator is informed and believes, claimed by the directors of the Atlantic & Pacific Railroad Company that the proceeds of a large portion of same were also used in the construction of said Carondelet Branch; but your orator says that he is informed and believes and has reason to believe, and upon information and belief alleges the fact to be, that no proper accounting has ever been made as to how said $800,000 of "real estate bonds" were used, or for what purpose the proceeds thereof were applied. And your orator further shows, that he is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, that the said $1,500,000 "income bonds," issued as aforesaid, on the 1st of September, 1872, as also the $2,000,000 improvement bonds, issued as aforesaid on the 15th of December, 1874, were issued and caused to be issued and delivered by the board of directors of the Atlantic & Pacific Railroad Company, not for the purpose or use of the Pacific Railroad, or for the payment of its debts, or of any debts contracted on its behalf or for its benefit—as the income of the said road was amply sufficient therefor—but that the same were fraudulently issued and hypothecated for the purpose of paying and securing the debts of the said Atlantic & Pacific Railroad Company and the individual debts of the board of directors of said company, to wit, Andrew Pierce, William H. Coflin, and others of the board of directors of said company, and that no part of said bonds were used for the benefit of said Pacific Railroad or for the payment of its debts, but the same were issued and used in manner as aforesaid in fraud of the rights of your orator and all other stockholders of the Pacific Railroad. That the said "income bonds" so is-

sued on September 1st, 1872, were chargeable against the income of
59 said road, and bear interest at seven per cent. per annum, and are numbered from one to one thousand, both inclusive, of the denomination of $1,000 each, and eight hundred of said bonds numbered from 1001 to 1800, both inclusive, being of a denomination of $500 each; and one thousand of said bonds numbered from 1801 to 2800, both inclusive, are of the denomination of $100 each. That said improvement bonds so issued as aforesaid on December 15, 1874, and due November 1, 1889, bear interest at seven per cent. annum, payable semi-annually, and are all of the denomination of $1,000 each, and guaranteed by the Atlantic & Pacific Railroad Company.

And your orator further shows and says that he is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, that said Andrew Pierce, Clinton B. Fisk, and others of the directors of the Atlantic & Pacific Railroad Company, constituting a majority of said board of directors, fraudulently combined and confederated together, aided by a majority of the members of the Pacific Railroad Company, for the purpose of encumbering and misappropriating the property of the said Pacific Railroad, and obtaining possession thereof freed from any claim of title thereto or interest therein of the stockholders of said road, and of the unsecured creditors thereof. That in furtherance of said fraudulent purpose a majority of the directors of said Atlantic & Pacific Railroad Company conspired with James H. Baker, Daniel R. Garrison, and James J. Taussig and others, constituting a majority of the directors of said Pacific Railroad, and that in pursuance of such fraudulent purpose, and for the carrying out the object and purpose of said conspiracy, the said income and improvement bonds were issued in fraud of the rights of your orator and all other bona fide stockholders in said Pacific Railroad. That said "income" and "improvement bonds" were fraudulently distributed among the directors of said Atlantic & Pacific Railroad Company and said Pacific Railroad and their associates, who received the same at nominal prices, and all parties now holding any portion of the same received said bonds with full notice of the facts above recited and hereinafter stated, as also of the fact that there was no authority given under
60 said pretended lease for issuing said bonds, a copy of which is recorded in each county through which the said Pacific Railroad runs.

That the holders of said bonds, issued under and purporting to be secured by said mortgage to said Vail and Fish, trustees, dated July 10th, 1875, took them with full knowledge of all the matters and things alleged in this petition, and have bought and received them as a tainted, doubtful and illegal security, at a low price, in some instances merely nominal. The petitioner avers this to be specially true of C. K. Garrison, one of the defendants herein named, who, after attending a meeting of the stockholders of the Pacific Railroad Company, held in the city of New York, on the 28th and 29th of December, 1875, at which meetings the frauds of some of the other defendants herein, and the want of equity attainting said third-mortgage bonds, were discussed and expressed, went from said meeting and thereafter purchased from various creditors of the Atlantic & Pacific Railroad Company said third-mortgage bonds to a very large nominal amount, the petitioner avers upon information and belief, to the par amount of $1,500,000, at the nominal rate of 50 per cent., or thereabouts.

That a pretended consent of stockholders of said Pacific Railroad to

the issuing of said third-mortgage bonds was obtained, as defendants are informed and believe, and has reason to believe, and upon information and belief alleges the fact to be, by false statements and fraudulent representations made by the board of directors of the Atlantic & Pacific Railroad Company, for whose benefit mainly the said pretended third mortgage was made and executed; that said false and fraudulent statements and representations were made by means of circulars distributed among the stockholders of said Pacific Railroad, by the instigation and procurement of the directors of the Atlantic & Pacific Railroad Company. That by said false and fraudulent circulars, and the false statements therein contained, the stockholders of said Pacific Railroad were led and induced to believe that such permanent improvements and extensions had been made to said Pacific Railroad, and that such bona fide indebtedness had been contracted therefor, as to make necessary and expedient the issuing of said four millions of bonds, and the
61 execution of said third mortgage for the securing thereof. All which representations so made were, as your orator is informed and believes, false and fraudulent; and had not such false representations been so made as aforesaid by the directors of said Atlantic & Pacific Railroad Company, such pretended consent could not have been obtained from the then stockholders of the Pacific Railroad, for your orator is informed and believes, and has reason to believe, and upon information and belief charges the fact to be, that the directors of said Atlantic & Pacific Railroad Company caused to be printed and issued among the stockholders of said Pacific Railroad fraudulent circulars, with blank power of attorney attached thereto, for the purpose of obtaining authority and ratification by the stockholders by the issuing of said third mortgage.

That in said circular false and fraudulent statement of facts were made as to pretended permanent improvements of said Pacific Railroad, as to the building of new bridges by the lessee, which, in fact, had not been built, and as to the existence of a large pretended floating indebtedness of the Pacific Railroad, which did not in fact exist.

That by means of these and other false statements in said circulars contained, so fraudulently made as aforesaid, the signatures of a large number of stockholders were obtained to the proxies or powers of attorney attached to said circulars That such proxy and power of attorney was so attached to said fraudulent circulars that the same could be detached and removed therefrom without defacement; that such separation was made, and fraudulently caused to be made, by the directors of said Atlantic & Pacific Railroad Company, who thereby attempted to secure, by the fraudulent means in manner as aforesaid, the proxies and powers of attorney of the stockholders of said Pacific Railroad for the ratification of said third mortgage. That, in fact, the pretended ratification of the stockholders was not otherwise secured than through and by means of such pretended proxies and powers of attorney thus obtained as aforesaid; that the powers of attorney proxies and so obtained only authorized the issuing of bonds to pay bona fide indebtedness of said Pacific Railroad.

That the representations contained in said circular are false
62 and fraudulent in this, that it implies that floating liabilities had been created on account of the Pacific Railroad Company by the Atlantic & Pacific Railroad Company, in permanently improving the Pacific Railroad in a manner and form and to an extent not required to be done at the proper charge and expense of the Atlantic & Pacific Railroad Company, by said pretended lease, under which the Atlantic

& Pacific Railroad Company were in possession of the premises known as the Pacific Railroad. Your petitioner avers upon information and belief, and so charges the fact to be, that no such liabilities rightfully existed as against the Pacific Railroad.

That said circular, so issued as aforesaid, was issued as aforesaid by the president of the Pacific Railroad, at the instigation and procurement of the directors of the Atlantic & Pacific Railroad, pursuant to the conspiracy so entered into as aforesaid. That at the time of issuing the same, the said president of the Pacific Railroad Company was really acting for and in the pay of the Atlantic & Pacific Railroad Company, and was auditor of said last-named company. That these defendants had no knowledge of issuing said circular at the time, and had no knowledge of the execution of said third mortgage until a few days prior to the institution of this suit. A copy of said circular is, for the information of this honorable court, attached hereto and marked Exhibit B.

Defendants, further answering, show that the stockholders of the Pacific Railroad would, as they are informed and believe, and upon information and belief allege the fact to be, never would have consented to or sanctioned said third mortgage and the issuing of said third mortgage bonds had the facts been truthfully stated and made known to them, and that only through fraud and misrepresentation as to the necessity for same was such pretended consent obtained. The defendant admits that the said third mortgage bonds so issued in July, 1875, were antedated as of May 1st, 1875, and the interest made payable thereon on the first of November and May in each year; and the defendants say that they are informed and believe, and have reason to believe, and upon information and belief alleges the fact to be, that the said bonds were so antedated for the pur-
63 pose of having the interest thereon become due and payable at an early day in furtherance of the fraudulent purpose aforesaid, and enable said parties to the better carrying into effect their fraudulent scheme of making and causing to be made a foreclosure and sale of the said Pacific Railroad; wherefore defendant says that the complainant having a full knowledge of all the facts in the premises comes not into court with clean hands, and is not entitled in equity to any aid or relief from this honorable court.

Defendants further answering say that as they are informed and believe, and have reason to believe, and upon information and belief, charge the fact to be, that said complainant Ketchum fraudulently conspired, confederated, and combined with Andrew Pierce, of Boston, Joseph Seligman, Clinton B. Fisk, directors of the Atlantic & Pacific Railroad Company, and with James Baker, director and attorney for the Pacific Railroad, as also attorney for the Atlantic & Pacific Railroad Company, for the foreclosure by consent of said third mortgage, in fraud of the rights of all unsecured creditors and stockholders of said Pacific Railroad, and a majority of the directors of both of said companies consenting, did file, cause, and permitted to be filed, in the name of said Ketchum, at the request and procurement of said parties, and in furtherance of the fraudulent conspiracy and combination so formed and entered into for the defrauding of the stockholders and bona fide creditors of said Pacific Railroad, the said bill of foreclosure; that the same was by the said parties caused to be prepared before the said first coupons upon said third mortgage bonds so antedated as aforesaid fell due. That the stockholders of the Pacific Railroad held a meeting in the city of New York on the 3d day of November, three days after said suit had been

the issuing of said third-mortgage bonds was obtained, as defendants are informed and believe, and has reason to believe, and upon information and belief alleges the fact to be, by false statements and fraudulent representations made by the board of directors of the Atlantic & Pacific Railroad Company, for whose benefit mainly the said pretended third mortgage was made and executed; that said false and fraudulent statements and representations were made by means of circulars distributed among the stockholders of said Pacific Railroad, by the instigation and procurement of the directors of the Atlantic & Pacific Railroad Company. That by said false and fraudulent circulars, and the false statements therein contained, the stockholders of said Pacific Railroad were led and induced to believe that such permanent improvements and extensions had been made to said Pacific Railroad, and that such bona fide indebtedness had been contracted therefor, as to make necessary and expedient the issuing of said four millions of bonds, and the
61 execution of said third mortgage for the securing thereof. All which representations so made were, as your orator is informed and believes, false and fraudulent; and had not such false representations been so made as aforesaid by the directors of said Atlantic & Pacific Railroad Company, such pretended consent could not have been obtained from the then stockholders of the Pacific Railroad, for your orator is informed and believes, and has reason to believe, and upon information and belief charges the fact to be, that the directors of said Atlantic & Pacific Railroad Company caused to be printed and issued among the stockholders of said Pacific Railroad fraudulent circulars, with blank power of attorney attached thereto, for the purpose of obtaining authority and ratification by the stockholders by the issuing of said third mortgage.

That in said circular false and fraudulent statement of facts were made as to pretended permanent improvements of said Pacific Railroad, as to the building of new bridges by the lessee, which, in fact, had not been built, and as to the existence of a large pretended floating indebtedness of the Pacific Railroad, which did not in fact exist.

That by means of these and other false statements in said circulars contained, so fraudulently made as aforesaid, the signatures of a large number of stockholders were obtained to the proxies or powers of attorney attached to said circulars. That such proxy and power of attorney was so attached to said fraudulent circulars that the same could be detached and removed therefrom without defacement; that such separation was made, and fraudulently caused to be made, by the directors of said Atlantic & Pacific Railroad Company, who thereby attempted to secure, by the fraudulent means in manner as aforesaid, the proxies and powers of attorney of the stockholders of said Pacific Railroad for the ratification of said third mortgage. That, in fact, the pretended ratification of the stockholders was not otherwise secured than through and by means of such pretended proxies and powers of attorney thus obtained as aforesaid; that the powers of attorney proxies and so obtained only authorized the issuing of bonds to pay bona fide indebtedness of said Pacific Railroad.

That the representations contained in said circular are false
62 and fraudulent in this, that it implies that floating liabilities had been created on account of the Pacific Railroad Company by the Atlantic & Pacific Railroad Company, in permanently improving the Pacific Railroad in a manner and form and to an extent not required to be done at the proper charge and expense of the Atlantic & Pacific Railroad Company, by said pretended lease, under which the Atlantic

& Pacific Railroad Company were in possession of the premises known as the Pacific Railroad. Your petitioner avers upon information and belief, and so charges the fact to be, that no such liabilities rightfully existed as against the Pacific Railroad.

That said circular, so issued as aforesaid, was issued as aforesaid by the president of the Pacific Railroad, at the instigation and procurement of the directors of the Atlantic & Pacific Railroad, pursuant to the conspiracy so entered into as aforesaid. That at the time of issuing the same, the said president of the Pacific Railroad Company was really acting for and in the pay of the Atlantic & Pacific Railroad Company, and was auditor of said last-named company. That these defendants had no knowledge of issuing said circular at the time, and had no knowledge of the execution of said third mortgage until a few days prior to the institution of this suit. A copy of said circular is, for the information of this honorable court, attached hereto and marked Exhibit B.

Defendants, further answering, show that the stockholders of the Pacific Railroad would, as they are informed and believe, and upon information and belief allege the fact to be, never would have consented to or sanctioned said third mortgage and the issuing of said third mortgage bonds had the facts been truthfully stated and made known to them, and that only through fraud and misrepresentation as to the necessity for same was such pretended consent obtained. The defendant admits that the said third mortgage bonds so issued in July, 1875, were antedated as of May 1st, 1875, and the interest made payable thereon on the first of November and May in each year; and the defendants say that they are informed and believe, and have reason to believe, and upon information and belief alleges the fact to be, that the said bonds were so antedated for the pur-

63 pose of having the interest thereon become due and payable at an early day in furtherance of the fraudulent purpose aforesaid, and enable said parties to the better carrying into effect their fraudulent scheme of making and causing to be made a foreclosure and sale of the said Pacific Railroad; wherefore defendant says that the complainant having a full knowledge of all the facts in the premises comes not into court with clean hands, and is not entitled in equity to any aid or relief from this honorable court.

Defendants further answering say that as they are informed and believe, and have reason to believe, and upon information and belief, charge the fact to be, that said complainant Ketchum fraudulently conspired, confederated, and combined with Andrew Pierce, of Boston, Joseph Seligman, Clinton B. Fisk, directors of the Atlantic & Pacific Railroad Company, and with James Baker, director and attorney for the Pacific Railroad, as also attorney for the Atlantic & Pacific Railroad Company, for the foreclosure by consent of said third mortgage, in fraud of the rights of all unsecured creditors and stockholders of said Pacific Railroad, and a majority of the directors of both of said companies consenting, did file, cause, and permitted to be filed, in the name of said Ketchum, at the request and procurement of said parties, and in furtherance of the fraudulent conspiracy and combination so formed and entered into for the defrauding of the stockholders and bona fide creditors of said Pacific Railroad, the said bill of foreclosure; that the same was by the said parties caused to be prepared before the said first coupons upon said third mortgage bonds so antedated as aforesaid fell due. That the stockholders of the Pacific Railroad held a meeting in the city of New York on the 3d day of November, three days after said suit had been

commenced, which meeting was addressed by said Andrew Pierce and Clinton B. Fisk, and at which said Wm. H. Coffin was present. That at said meeting, the fact that said suit had been commenced or contemplated was carefully withheld and concealed from the stockholders by said Pierce and Fisk, and in no part of the remarks made by either of them to said meeting was any allusion made to the commencement, or threatened commencement, of said foreclosure suit.

64 That the affidavit of the complainant to the printed bill filed in this court, was made on the 3d day of November last, and soon thereafter the same was filed in this honorable court, at the procurement of the majority of the directors of the Atlantic & Pacific Railroad Company, and the majority of the directors of the Pacific Railroad, the attorney and law officers of both companies consenting thereto; all which is against equity and good conscience.

And defendant further answering shows and says that he is informed and believes, and has reason to believe, and upon information and belief charges the fact to be, that the said fifteen hundred thousand dollars of so-called "income bonds" issued September 2, 1872, and mentioned in said alleged mortgage, were fraudulently issued by the procurement of the directors of the Atlantic & Pacific Railroad Company while in possession of the Pacific Railroad, and in control of all its affairs under said pretended lease; that said "income bonds" were fraudulently issued on the pretence of paying a fictitious indebtedness of the said Pacific Railroad for permanent improvements of the tracks, road-bed and bridges of the same; that as defendant is informed and believes, no such improvements had been made, and such pretended indebtedness did not exist. That the said two million of so-called "improvement bonds," issued on the 15th day of December, A. D. 1874, were in like manner fraudulently issued for pretended permanent improvements which were never, in fact, made on said Pacific Railroad.

That as respondent is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, the said Pacific Railroad was, on the 29th of June, 1872, when the same was taken into possession by the Atlantic & Pacific Railroad Company, in good repair and condition as a first class railroad; its bridges mostly new, and its road-bed, ties, and rails in good condition, and the floating debt of said corporation amounted to no more than about $263,000; that the income of said road was amply sufficient, if properly applied, to pay all operating expenses of said road, and to pay the interest on its bonded debt and all taxes and to pay in full the small floating debt then existing. But defendant answering, shows and says

65 that he is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, that Andrew Peirce, Jos. Seligman, Clinton B. Fisk, Wm. H. Coffin, and others, composing a majority of the directors of the Atlantic & Pacific Railroad Company, fraudulent conspiring, combining, and confederating with James Baker and others, constituting a majority of the directors of the said Pacific Railroad, to defraud the stockholders and unsecured creditors of said Pacific Railroad, particularly the county of St. Louis, creditor to the extent of $700,000, did misappropriate the funds of the said Pacific Railroad Company, and fraudulently conspiring, combining, and confederating to obtain the control and ownership of the said Pacific Railroad, freed from all claims of the stockholders and bona fide creditors, fraudulently issued, and caused to be issued, the said "income bonds" and "improvement bonds," and at nominal prices distributed said bonds among themselves and their associates, and for the purpose of and in

furtherance of the said conspiracy and combination so formed and entered into to defraud the stockholders and unsecured creditors in manner as aforesaid, issued and caused and procured by the means and in the manner as aforesaid the said "third-mortgage bonds" to be issued and provided for the exchange of said "income bonds" and "improvement bonds," with the intent and for the purposes as aforesaid.

And defendants further answering deny that the Pacific Railroad is unable, if properly managed, to pay its valid and legal obligations in full, as they become due, and denies that any commercial paper legally and properly made and executed by said Pacific Railroad has been protested, for the reason that no such commercial paper has, since June 1st, 1872, been properly and legally made by said company. But defendants admit that the Atlantic & Pacific Railroad Company is without sufficient means to pay and discharge its valid obligations in full as they become due, as complainant hath alleged. And respondent further says that said Atlantic & Pacific Railroad Company are bankrupt and insolvent, and are wholly unable to pay any unsecured claims against them. That their mortgage creditors are pressing their mortgage claims to foreclosure and seeking for a sale of all the premises known as
66 the Atlantic & Pacific Railroad, as will more fully appear by reference to the suit of Littlefield vs. The Atlantic & Pacific Railroad Company and others, now pending in this court, and to the complaint and pleadings in which suit your petitioner begs leave to refer, as need may occur in the progress of this suit.

And defendants, further answering, admit that the interest upon the first and second mortgages upon the Pacific Railroad has been regularly paid as the same became due, and that the premises covered by said mortgages are ample security for the payment of the bonds secured by these two mortgages. And respondent admits that a receiver should be appointed, as prayed for by complainant, but not for the reasons and causes by him alleged, but for the protection of the stockholders and unsecured creditors of said road, whose interests are endangered in the premises as against the fraudulent conspiracy and combination of the directors, as hereinbefore stated. All which matters and things defendants are ready and willing to aver, maintain, and prove, as this honorable court shall direct; wherefore defendants say that by reason of the matters and things herein set forth and shown to this honorable court no foreclosure should be granted or sale made under said third mortgage, but that said mortgage should be declared to be, by reason of the matters herein stated, null and void, and of no binding force or effect in law or equity; and defendants pray for such further and other relief as to the court shall seem meet, and as to equity and good conscience appertains.

FRANK J. BOWMAN,
Solicitor for Thos. P. Akers and the County of St. Louis.

BRITTON A. HILL,
Of Counsel.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Herman Rechtien, being duly sworn on oath, says: That he is, and since December third, A. D. 1874, has been county treasurer of the county of St. Louis; that, as such officer, he has special charge
67 of the financial affairs and moneys of said county, and, as an officer of said county, has given special attention to the matter

of its claim against the Pacific Railroad; that he has carefully read the above and foregoing answer; that of and concerning the matters stated therein he has made special inquiry, and the same are true according to his best knowledge, information, and belief.

M. RECHTIEN,
Co. Treasurer, St. Louis Co., Mo.

Subscribed and sworn to before me this 25th day of April, 1876.

C. M. WARD,
U. S. Commissioner, Eastern District of Missouri.

Adjourned term, June, 1876.

And afterwards, to wit, on the 5th day of June, A. D. 1876, the following answers were filed in said cause, to wit:

In the circuit court of the United States for the eastern district of Missouri.

GEORGE E. KETCHUM
vs.
THE PACIFIC RAILROAD, THE ATLANTIC AND Pacific Railroad Company, James Baker, Rufus J. Lackland, Dwight Durkee, Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, and Luther C. Clark.

Answer of Rufus J. Lackland and Dwight Durkee to the bill of complaint herein:

And now, on this day come the defendants, Rufus J. Lackland and Dwight Durkee, by A. M. Gardner, their solicitor, and for a separate answer to the bill of complaint in this cause say, that true it is that the said Pacific Railroad executed the mortgage or deed of trust, and the several series of bonds mentioned and set forth in said bill of complaint, and that the said Rufus J. Lackland and Dwight Durkee were made trustees in and by the said mortgage executed to them on the 19th of April, 1872, to secure eight hundred thousand dollars in bonds of the same date, and of the char'ter and description mentioned in said bill of complaint, and now are such trustees. And they further say that they know of no reason why the prayer of complainant's bill should not be granted.

A. M. GARDNER,
Solicitor for Defendants, Lackland and Durkee.

And also, on the said 5th day of June, A. D. 1876, the following answer was filed in said cause, to wit:

68 GEO. E. KETCHUM, WITH WHOM ARE joined C. K. Garrison & others, complainants,
vs.
PACIFIC RAILROAD AND OTHERS, DEFENDANTS.

Now comes the Atlantic & Pacific Railroad Company, defendant in the above entitled cause, and files this its answer under its seal, to the

bill of complaint in the above-entitled cause, and says that the allegations and averments in said bill are true. This defendant says that it is true that it is a corporation created in the manner and with the powers mentioned in said bill. That it is also true that the Pacific Railroad is a corporation with the powers mentioned in said bill, and that said last-named corporation executed the several mortgages; and conveyances, mortgages, and deeds of trust in said bill of complaint mentioned were duly executed and delivered as therein stated. It is also true, as this defendant is advised and believes, that all of said mortgages and deed of trust were executed in good faith and for the sole purpose of properly securing the just debts of said Pacific Railroad. This defendant further says that it *it* is also true, at the time and in the manner alleged, the said Pacific Railroad did make the said lease of date of June 29th, 1872, to this defendant, the terms of which lease are correctly stated in substance in said bill; and it is also true that this defendant is in default in compliance with the provisions of the said lease required of it as stated in said bill. It is also true that there is a large sum of money due for taxes remaining unpaid, for which both this defendant and the Pacific Railroad were at the date of the institution of this suit. It is also true that this defendant and the Pacific Railroad are both without sufficient means to pay or discharge their several valid obligations, and that the commercial paper of each of said corporations has been protested for non-payment. This defendant knows of no reason why the plaintiffs in the above-entitled suit should not have their lien and rights as set out in said bill enforced. And this defendant prays the court to protect all its rights and interests in the premises.

ATLANTIC & PACIFIC RAILROAD CO.,
[SEAL.] By SAMUEL HAYS,
Vice President.

J. N. LITTON,
Of Counsel and Solicitor for the Atlantic & Pacific Railroad Co.

69 And also, on said 5th day of June, A. D. 1876, the following other answer was filed in said cause, to wit:

GEORGE E. KETCHUM,
vs.
THE PACIFIC RAILROAD, THE ATLANTIC AND Pacific Railroad Company, James Baker, Rufus J. Lackland, Dwight Durkee, Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, and Luther C. Clark.

Answer of Uriel A. Murdock, Luther C. Clark, Edwin D. Morgan, Joseph Seligman, James Baker and Jesse Seligman, to the bill of complaint herein:

And now on this day came the defendants, Uriel A. Murdock, Luther C. Clark, Edwin D. Morgan, Joseph Seligman, James Baker, and Jesse Seligman, by James Baker, their solicitor, and for answer to the bill of complaint in this cause say, that true it is that the said Pacific Railroad executed the several mortgages or deeds of trust, and the several series of bonds mentioned and set forth in said bill of complaint, and that the said Murdock and Clark were made trustees in and by the said mortgage executed to them on the 15th day of July, 1868, to secure seven millions of dollars in bonds of the same date, and of the character and

description mentioned in said bill of complaint, and now are such trustees, and that the said Morgan and Joseph Seligman were made trustees in and by the said mortgage executed to them on the first day of July, 1871, to secure the payment of three millions of dollars in bonds of the same date, which are of the description mentioned in said bill, and now are such trustees. It is also true that the said Baker and Jesse Seligman were made trustees in and by the said mortgage executed to them on the first day of October, 1873, to secure the payment of a series of bonds of the same date, amounting in the aggregate to five hundred thousand dollars.

It is also true that the interest on all the aforesaid bonds have been regularly and promptly paid at maturity, according to the tenor and effect of said bonds.

These defendants ask that the interest and rights of the holders of said bonds, and that the rights and powers of these defendants may be fully protected by this honorable court.

JAMES BAKER,
Solicitor for said defendants.

70 And afterwards, to wit, on the 6th day of June, A. D. 1876, the following answer was filed in said cause, to wit:

GEORGE E. KETCHUM ET AL.
vs.
THE PACIFIC RAILROAD ET AL.

The defendants Henry F. Vail and James D. Fish, by Noble & Orrick, their attorneys, answering the bill of complaint of the said George E. Ketchum, say:

1st. That it is true, as alleged in said bill of complaint, that they are trustees in the deed of trust therein described, dated July 10th, 1875, made by the said Pacific Railroad to these defendants, as trustees.

2d. These defendants admit the allegations of said bill of complaint are true, as they are informed and believe.

And these defendants, as trustees of the several and varied interests of the bondholders secured by said deed of trust, submit the same to the judgment of this honorable court, that the same may be duly provided for and protected, and ask that they may have such relief, including an allowance for their costs and expenses herein, as to your honorable court may seem meet.

NOBLE & ORRICK,
Attorneys for Vail and Fish, defendants.

Answer under oath is hereby waived.

CLINE, JAMISON & DAY,
And JAMES O. BROADHEAD,
Attorneys for complainants.

71 And afterwards, on the 6th day of June, 1876, the following further proceedings were had in said cause, to wit:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

Now comes Thomas P. Akers and the County of St. Louis, by Frank

J. Bowman, esq., their solicitor, and, by leave of court, dismiss the cross-bill filed herein, and withdrew the answer of said St. Louis County thereto, without prejudice to the lien claim of said county in this behalf.

Adjourned term.

And on the said 6th day of June, 1876, the following further proceedings were had in said cause, to wit:

In chancery.

Decree of foreclosure and sale.

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
THE PACIFIC RAILROAD, THE ATLANTIC & PACIFIC Railroad Company et al., defendants. } No. 703.

And now at this day come the said complainant, by James O. Broadhead, his solicitor, and Cornelius K. Garrison, who, by the order of this court, has been made a co-complainant herein by his solicitors, Cline,
72 Jamison & Day, and also James Seligman and Thomas W. Pierce, who have also, by the order of this court, been made co-complainants herein, by their solicitors, Grover & Ellis; and also the defendants The Atlantic & Pacific Railroad Company, by its solicitor, Joseph N. Litton, and the Pacific Railroad, by James Baker, its solicitor; and the said Rufus J. Lackland and Dwight Durkee, appearing by their solicitor, A. M. Gardner, and the said Jesse Seligman, Edwin D. Morgan, Uriel A. Murdock, Joseph Seligman, Luther C. Clark, appearing by their solicitor, James Baker, and the said Henry F. Vail and James D. Fish, appearing by their solicitors, Noble and Orrick; and the said James Baker appearing in his own proper person; and it having been suggested to the court that James Punnett has departed this life since the institution of this suit, it is ordered by the court that this suit abate as to him.

And therefore, the said cause coming on to be heard upon the bill of said complainant and the answers of said defendants and the exhibits and proofs in the cause, the County of St. Louis and Thomas P. Akers appear by their solicitor, Frank J. Bowman, and dismiss their answers and cross-bills, and Frank J. Bowman, as solicitor for the County of Louis, withdraws the separate answer of the county contesting the validity of said bonds; and it appearing to the court that the Pacific Railroad did, on the 10th day of July, A. D. 1875, make and deliver to the said Henry F. Vail and James D. Fish its mortgage or deed of trust, of that date, by which the said Pacific Railroad did convey and mortgage to the said Vail and Fish all the property, real and personal, rights, interests, and franchises of the said Pacific Railroad, as set forth in the said mortgage of the date last above referred to, and more particularly described as follows, that is to say:

1. All and singular the entire line of the Pacific Railroad [of Missouri], two hundred and eighty-three miles in length, extending from the depot at Seventh street, in the city of St. Louis, State of Missouri, to the western boundary of said State, at Kansas City, and passing through the counties of St. Louis, Franklin, Gasconade, Osage, Cole, Moniteau, Morgan, Cooper, Pettis, Johnson, Cass, and Jackson,
73 in said State of Missouri, with its appurtenances, including,

among other things, the track on Poplar street and the levee, in the city of St. Louis, commonly known as the "Poplar street track," and including the real estate, depots, stations, machine-shops, rolling-stock, machinery, rights, and interests, and franchises of said railroad, subject to the liens of the two mortgages described in the bill of complaint, severally executed by said Pacific Railroad, one of which was so executed to said Murdock, Punnett, and Clark, and the other of which was executed to Edwin D. Morgan and Joseph Seligman.

2. All and singular the following described real estate in the city of St. Louis, State of Missouri, viz: Four blocks of ground in the city of St. Louis, being city blocks numbered four hundred and eighteen, four hundred and twenty-three, four hundred and twenty-eight, and four hundred and thirty-three, bounded east by Seventh street, south by Cerre street, west by Eleventh street, and north by Poplar street.

Also block number two hundred and thirteen, of the city of St. Louis, bounded east by Twelfth street, south by Austin street, west by Fourteenth street, and north by Randolph street—saving and excepting therefrom lots 26, 29, 33 and 34, the north one-half of lot number 36, and part of lot number 25, embracing the southwest corner of said block, sixty-six feet eight inches on Fourteenth street, by one hundred feet on Austin street.

Also the following described real estate in city block number four hundred and thirty-eight, viz:

Beginning at the northwest corner of Eleventh and Cerre streets in the city of St. Louis, the southeast corner of said block; thence west along the north side of Cerre street one hundred and fifty-two feet and six inches, more or less, to an alley; thence north one hundred feet; thence east, parallel to Cerre street one hundred and fifty-two feet and six inches to Eleventh street; thence southwardly on the line of Eleventh street to the place of beginning.

Also the following, viz: Commencing at the southwest corner of city block number four hundred and thirty-eight, the northeast corner of Twelfth and Cerre streets; thence north one hundred and four feet and six inches; thence east one hundred and fifty-two feet and six inches to an alley; thence south one hundred and four feet six inches to Cerre street; thence west one hundred and fifty-two feet six inches to Twelfth street, the place of beginning.

74

And also the following described tract or parcel of land, viz: Commencing at the northwest corner of city block number four hundred and thirty-nine, the southeast corner of Twelfth and Cerre streets; thence south one hundred and seventy-six feet, more or less, to the south line of property of the Pacific Railroad; thence eastwardly along said south line to the northeast corner of said block four hundred and thirty-nine; thence along the south line of Cerre street to the place of beginning; being the same property mentioned and described in the bill of complaint as covered by the mortgage executed to Lackland and Durkee, and said premises being conveyed subject to the lien of said last mentioned mortgage.

3. All and singular the branch railroad of the said Pacific Railroad, constructed and operated, and extending from a point on the main line at or near Kirkwood, thence to the termination of the said railroad at the Mississippi river at Carondelet or South St. Louis, with its appurtenances, including the depots, stations, machine-shops, superstructures, and erections on the line of said branch railroad, or at Carondelet aforesaid, together with all the side tracks and switches connected with said branch railroad, and also all the lands acquired and appro-

priated, or that may be acquired or appropriated for depots, engine-houses, car-houses, station-houses, warehouses, machine-shops, or other superstructures and erections, on the line of said branch railroad, or at Carondelet aforesaid; which said last mentioned premises and property were so mortgaged, subject to the lien of a mortgage, to Jesse Seligman and James Baker, described in the bill of complaint.

Which said deed of trust or mortgage, dated July 10th, 1875, was made to said Vail and Fish, described in the bill of complaint, as trustees and in trust to secure the payment of an issue of four thousand bonds, therein termed "third mortgage bonds," of one thousand dollars each, dated July 10th, 1875, payable twenty years after date, to bearer
75 in lawful money of the United States, at the office of the Atlantic & Pacific Railroad Company, in New York, with interest at seven per cent. per annum, from May 1st, A. D. 1875, in like lawful money, semi-annually on the first November and May in each year, on the presentation of the coupons annexed to said bonds. And it further appearing that said mortgage or deed of trust provides that if the said Pacific Railroad should fail to pay the interest on any of the said bonds thereby secured, for six months after the same should become due and payable and demand made therefor, said trustees were authorized and required, on the written request of the holders of bonds to the amount of five hundred thousand dollars, the principal or interest of which should then be in arrears or unpaid, to sell the said railroad and branch road in the complainant's bill described and set forth, and all the property by said mortgage conveyed, at public auction in the city of St. Louis, at the time, on the terms and in the manner set forth and described in the said mortgage; and to apply the net proceeds of said sale to the payment of all the bonds secured by said mortgage and then unpaid, pro rata.

And it further appearing that the said Pacific Railroad had, prior to the said 10th day of July, A. D. 1875, issued its bonds amounting, in the aggregate, to the sum of fifteen hundred thousand dollars, and designated as "income bonds," each of which bonds was dated September 2d, 1872, and of which one thousand were for one thousand dollars each, and eight hundred were for five hundred dollars each, and one thousand for one hundred dollars each, payable on the first of September, 1892, with interest at seven per cent. per annum, on the first of March and September of each year; and it further appearing that the said Pacific Railroad had made a further issue of bonds, amounting, in the aggregate, to the principal sum of two millions of dollars, and designated as "improvement bonds," consisting of two thousand bonds of one thousand dollars each, and dated December 15th, 1874, payable on the first of November, 1889, with interest at seven per cent. per annum, payable on the first of May and November in each year, on the presentation of the coupons annexed to said bonds; and it fur-
76 ther appearing to the court that by the terms of said "third mortgage" it was provided that the said third-mortgage bonds should be used in retiring and canceling the said issue of income bonds and improvement bonds, so far as the same could be done; and it further appearing that the entire amount of third-mortgage bonds secured by said mortgage were issued by said Pacific Railroad, and that a sufficient number of said bonds were placed in the hands of the trustees in said third mortgage mentioned, to wit, the said Vail and Fish, for the purpose of being exchanged for "income" and "improvement bonds;" and it further appearing that a portion of said bonds have been exchanged for "income" and "improvement bonds," and that a portion

of said bonds have been negotiated by said company; and it further appearing that a number of said bonds are now in the possession of the said trustees, Vail and Fish; and it further appearing that of the said third-mortgage bonds now outstanding none of the interest which became due on said bonds, or any of them, on the first day of November, A. D. 1875, has been paid, but that the whole amount thereof remains due and unpaid; and it further appearing that the said complainant, George E. Ketchum, is the holder and owner of ten of said "third-mortgage bonds," secured by the aforesaid mortgage or deed of trust; that the said Cornelius K. Garrison is the owner and holder of fourteen hundred of said bonds, and that the said James Seligman is the owner and holder of three hundred and forty-seven of said bonds; and that the said Thomas W. Pierce is the owner and holder of fifty of said bonds, secured by said mortgage, and that the payment of the interest which became due on said eighteen hundred and seven bonds on the first day of November, A. D. 1875, was duly demanded on said day according to the tenor of said mortgage, and that the coupons representing said interest were presented for payment at the place where the same by the terms thereof are payable, and payment thereof demanded and refused. And it further appearing to the court that the interest of the said complainant and the interests of other holders of like bonds may be seriously affected by delay in the institution of proceedings to foreclose the said mortgage, inasmuch as by the terms of said mortgage the said trustees are not authorized to sell
77 the property secured by said mortgage until six months after demand made for the payment of said interest.

Now, therefore, the court being fully advised in the premises, and by the consent of all the parties to this suit, through their solicitors of record, thereupon and in consideration thereof, it is ordered, adjudged, and decreed as follows, to wit:

That the said Pacific Railroad do stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises, property and franchises, and that the said Pacific Railway and property, together with the franchises and appurtenances of the said railway company as in said deed of trust or mortgage, dated July 10, 1875, is described, be sold at public auction by Seymour D. Thompson, master in chancery of this court, to pay and satisfy the amounts due by said company upon said bonds, and any other indebtedness which the court may order to be paid out of the proceeds of said sale, together with the costs of suit and of said sale, including the services of said trustees and their solicitor's and attorney's fees in and about the management of said trust as may hereafter be ordered by this court; and that upon said sale the said master shall execute a certificate stating such sale and setting out the terms and conditions thereof, and that he report said sale and the terms and conditions thereof immediately after said sale to the court; and that upon the terms of such sale being complied with, and the sale approved and confirmed by the court, said master be, and he is hereby, authorized and directed to execute and deliver to the purchaser or purchasers of said property good and sufficient deed or deeds for the same.

And it is further ordered, that upon the sale of the said road, property and franchises, the said Seymour D. Thompson, master, shall require the payment by the purchaser of the sum of at least two hundred thousand dollars in cash, or the delivery to him of a good and sufficient bond with sureties to be by him approved, for the payment of such sum of $200,000 when and as soon as thereto required by the court.

And it is further ordered and decreed that the terms and conditions of said sale shall be the payment of said sum of two hundred
78 thousand dollars cash, or the execution and delivery of the bond hereinbefore specified, on the delivery of the certificate of sale by said master, and that the balance of the sum bid shall, unless the purchaser be a bondholder or shall represent bondholders, be paid in cash at the confirmation of said sale, should said sale be confirmed; and if said purchaser shall be a bondholder, or represent bona fide bondholders, then and in that event should said sale be confirmed, he shall pay, or cause to be paid, in cash said sum of two hundred thousand dollars, and also the pro rata proportion from the proceeds of such sale which may be by the said court then found due to the other bona fide bondholders, and the balance after such cash payment may be paid in bonds, bona fide owned or represented by him, the court expressly reserving for future consideration all questions as to the rights, priorities and interests of all parties claiming any interest herein by way of bonds or otherwise.

And it is further ordered that the said master shall designate the time of making such sale, and shall advertise the same, together with a description of the property and franchises to be sold, by publication showing the time, terms, and place of sale and the property and franchises to be sold, to be inserted in the St. Louis Globe Democrat, published in the city of St. Louis, Missouri; in the Evening Post, published in the city of New York, and in the Boston Journal, published in the city of Boston, for the period of sixty days in each of said newspapers, the same to be inserted in each of said papers once a week during the first three weeks of said period, three times a week during the second three weeks of said period, and once every secular day during the remaining portion of said period of sixty days, the last insertion to be at least two weeks before the day of such sale. And the receivers are directed, on the certificate of the master, to audit and pay the expenses of such advertising, and also the expenses of printing this decree.

It is further ordered, adjudged, and decreed that all the premises, property, and franchises covered by and embraced in the said mortgage sued on, viz., the mortgage dated July 10th, 1875, shall be sold in a body and not separately, so that the purchaser or purchases at said sale shall acquire the whole of the property, premises, and franchises embraced in said last named mortgage, subject to all prior mortgages.

79 It is further ordered, adjudged, and decreed that in case said road, property, and franchises shall be purchased by bondholders, or by trustees for bondholders, then at any time within sixty days after said sale any bona fide holder or holders of said third mortgage bonds, secured by the mortgage sued on in this case, shall be allowed to become associated with said original purchaser or purchasers, in the property purchased, in the proportion that the bonds so held by him or them bears to the whole number of bonds issued, upon the same terms and conditions, with the same rights, subject to the same burdens and under the same scheme as may be provided for or agreed upon by said original purchaser or purchasers, for the purchasing and managing the property purchased, or for creating a corporation to which said property may be conveyed, provided that at the time of his election to share in such purchase he shall pay his proportion of the money and expenses paid by the original purchaser.

It is further ordered, adjudged, and decreed that any person or persons holding any of the "income bonds," or the "improvement bonds," above referred to, be, and they are hereby authorized at any time before

the sale of said property to exchange their income or improvement bonds for third mortgage bonds now held by the said trustees, Vail and Fish, as is provided in said third mortgage.

It is further ordered, adjudged, and decreed that nothing in this decree contained shall be construed to prejudice in any manner the claim of the county of St. Louis to a lien on the property and franchises of the said Pacific Railroad, alleged by the said county to exist, as fully appears by the amended petition in this cause filed by the said county for securing the payment of a certain debt of the said Pacific Railroad to said county for the sum of $700,000 and interest thereon, and alleged and claimed by the said county of St. Louis to be a prior lien therefor over all other incumbrances upon said property and franchises, the question of the existence and priority of said lien to be hereafter determined by this court—if not otherwise satisfactorily adjusted.

And it is further ordered and decreed that nothing herein con-
80 tained, or proceedings had in this cause, shall in any manner affect the rights of the Boonville Branch Railroad, or its rights to rent therefor.

It is further ordered, adjudged, and decreed that any party purchasing under this decree shall, in addition to the two hundred thousand dollars provided to be paid as above, pay in cash such further sum not exceeding two hundred thousand dollars as and when this court may require and direct to be paid, for the purpose of satisfying any statutory, equitable, or other lien claims that have been, or may be, filed in this case, or in the case of Calvin Littlefield v. The Atlantic & Pacific Railroad Company and others, pending in this court, and which have been, or may hereafter be, directed by the court to be paid by the receivers of either of said companies, and which, on a hearing and final accounting had between the receivers of the said Atlantic & Pacific Railroad Company and the receivers of the said Pacific Railroad, in respect to said liens and payments, may be found to be due and owing to the receivers of the said Atlantic & Pacific Railroad Company.

And afterwards, on the 18th day of September, 1876, the following motion to confirm sale was filed, to wit:

In the United States circuit court for the eastern district of Missouri.
In chancery.

GEORGE E. KETCHUM
vs.
THE PACIFIC RAILROAD AND OTHERS.

Now comes the above named complainant, by his solicitor, and moves the court to confirm the report of sale made by Seymour D. Thompson, in the above entitled cause, under the order of this court, of the railroad and other property of the said Pacific Railroad and the other property therein named.

JAS. O. BROADHEAD,
Sol. for Complainant.

81 And afterwards, on the 6th day of October, 1876, the following further proceedings were had in said cause, to wit:

GEORGE KETCHUM ET AL., COMPLAINANTS,
vs.
THE PACIFIC RAILROAD ET AL., DEFENDANTS.

Now at this day come the complainants by their solicitors, and moved

the court to confirm the sale of the Pacific Railroad, and its property and appurtenances, and the franchises of said Railroad Company, and the real estate and other property mentioned and described in the order of sale made by this court at its last term, in this cause, and it appearing to the court from the report of Seymour D. Thompson, master, appointed to make such sale, that the order of this court authorizing and requiring the said Seymour D. Thompson to make said sale has in all respects been complied with, and that James Baker became the purchaser of said railroad franchises and property above mentioned and referred to, for the sum of three millions of dollars.

Now therefore, it is ordered, adjudged and decreed that the said sale be and the same is hereby confirmed, according to the terms and conditions of the order of sale heretofore made by this court at its last term, and subject to the claim of the county of St. Louis to a prior lien thereon for seven hundred thousand dollars, and interest thereon as the same has been or may be established by this court, or by the Supreme Court of the United States in case of appeal.

And be it further remembered, that on the 19th day of September, 1876, N. A. Cowdrey and others, filed their certain motion and petition, in words and figures following, to wit:

(Which is omitted from printed record, and the amended
82 petition given in lieu thereof; they are substantially the same; the first gave the name of Pierce as purchaser, when the fact, which is shown in the amended bill, is that Baker was the purchaser.)

And afterwards, on the 22d day of September, 1876, the said N. A. Cowdrey and others filed the following amended motion and petition in said cause, to wit:

Circuit court of the United States, eastern district of Missouri. In chancery, May term, 1876.

GEORGE E. KETCHUM AND OTHERS
vs.
THE PACIFIC RAILROAD AND OTHERS. } No. 703.

Amended motion for liberty to intervene to set aside decree of June 6th, 1876, and sale, and for liberty to demur, answer, plead or appeal as advised.

Your orators, N. A. Cowdrey, Robert L. Cutting, jr., Peter Marié, Frank A. Otis, Jacob Cromwell and George L. Kingsland, all citizens of the city and State of New York, and George R. Fearing, a citizen of Newport, State of Rhode Island, humbly and respectfully petition and show to this court:

1st. That they are, in the aggregate, the owners of ten thousand shares of the capital stock of the Pacific Railroad, defendant in the above-entitled suit, of the nominal or par value of $1,000,000; that your orators, as a committee or agents, or other holders of the same stock, represent, and have most of the stock represented by them in the actual custody of your committee, shares of said Pacific Rail-
83 road stock to the amount in the aggregate of about thirty-five thousand shares, which are of the par or nominal value of $3,500,000.

2d. That your orators bring this petition not only for their own bene-

fit, but for the benefit of all other holders or owners of the capital stock of said Pacific Railroad, who come in and contribute to the cost and expenses necessary for the prosec'tion of this suit.

3d. That the defendant, the Pacific Railroad (of Missouri) is a railroad company about 283 miles in length, extending from its depot in the city of St. Louis to Kansas City, on the western boundary of the State of Missouri, passing through Jefferson City, the capital of the State.

That it is mortgaged as follows:

The first mortgage at 6 per cent. gold		$7,000,000
The second " " 7 " U. S. currency	Less payment made by the court or sinking fund.	2,741,000
3. The county of St. Louis 7 per cent		750,000
		$10,491,000
4. The mortgage sought to be foreclosed in this suit, the validity of which is denied by your orators, interest 7 per cent		4,000,000
Real estate bonds, @ 7 per cent		800,000
Car. branch bonds, @ 7 per cent		500,000
Making a total of		$15,791,000

inclusive of the disputed mortgage and the amounts to your orators unknown, paid by the court on said sinking fund, the annual interest on which, at 7 per cent., the sum of $1,105,370.

84 The earnings of the mortgaged premises and its leased lines of road have been, as reported by the various persons in charge, for the time below named, as follows:

1869,	Gross, $3,213,000	Net, $973,000
1870,	" 3,500,000	" 945,000
1871,	" 3,598,000	" 946,800
1872,	" 3,606,004	" No report.
1873,	" 3,708,600	" 1,402,715
1874,	" 3,713,000	" 1,451,889
1875,	" 3,200,000	" No report.

The road was placed in the hands of this court in the latter part of 1875. The officers of the court, the receivers, report the gross earnings of the mortgaged premises and its leased lines to have been since December 30, 1875, to August 31, 1876—eight months—$2,312,357, which they report to be an increase over the corresponding period in 1875 of $470,767. The earnings for the best part of the year, the months in which the crops are more largely moved, and more supplies wanted in the country in return for said crops, viz, September, October, November, and December, are yet to be made and added to said $2,312,357. The indications are, as your orators believe and aver, that the earnings this year, 1876, will be at least $4,000,000.

Your orators aver that sixty per cent. of the gross earnings is a full and large allowance for operating expenses and that, allowing sixty per cent. for expenses, the forty per cent. net earnings, viz, $1,600,000, is a sum more than sufficient to pay the annual interest upon all the mortgage debts of the defendant, the Pacific Railroad—including the $4,000,000 disputed mortgage, upon which this suit is brought—which annual interest, as above shown, is the sum of $1,105,370.

Your orators aver that some of them have had long and varied experience in the litigation pertaining to railroads in this country, extending through a period of about twenty years, and that they have never known, heard, or read of any case where a court of equity has enforced the foreclosure of a mortgage where the property in the hands of the court itself was earning enough to pay the annual interest upon the
85 debt which the court was enforcing the collection of, and they submit that in this case it is particularly inequitable so to do, because the loan purporting to be secured by the mortgage, by the written terms thereof submitted to the court, does not become due until May 1st, 1895.

4th. Your orators aver and charge, upon information and belief, that this court has been imposed upon, and has improvidently made its orders directing its receivers to pay large sums of money from the earnings of the premises in its custody, such as debts contracted by the Atlantic & Pacific Railroad Company, to a very large amount, and to pay very large sums which were junior in priority of lien and in equity to the lien which this suit was brought to enforce, and to the payment of large amounts as a sinking fund for the redemption or purchase of the second mortgage bonds above named, the principal of which does not become due until July, 1891. That the motive of the persons so procuring said improvident orders has been to use and make way with the net earnings and profits of the premises in the hands of the court, so that the same need not be applied in payment of the interest due upon the mortgage being foreclosed, and thus prevent a sale of the mortgaged premises; in other words, if the court had not made an improvident application of the moneys in its hands, the court itself would now have in its hands enough and more than enough money to pay the interest due, which this suit was brought to enforce the collection of.

5th. Your orators aver that the capital stock issued by the defendant, the Pacific Railroad Company, was issued to the amount of about $7,000,000; that the same is held and owned in scattering and mostly small lots by three to four hundred different persons, much of it by women, widows, and orphan children, who are obliged, from the necessity of their case, to look to this court to protect them against the combinations and conspiracies to injure them, made and entered into by C. K. Garrison and others, parties to this suit, directly or indirectly; and your orators, in behalf of said women, orphans, and unprotected stockholders, submit these facts and averments to this court for its consideration.

86 6th. Your orators show that at the present term of this court, viz, on the 6th day of June, 1876, the court made an order of sale of the mortgaged premises, and thereupon adjourned to Sept. 18th, 1876; that at the time, or just previous to said order of sale being made, the county of St. Louis withdrew its answer to the complaint, and also a cross-bill filed by them, which was then pending in this case, without any notice to your orators or to the stockholders of said Pacific Railroad; that, also, Thomas P. Akers, esq., had filed an answer and a cross-bill on his own behalf, and on behalf of all the other stockholders, which was then pending in this court, and which, upon said 6th day of June, 1876, he withdrew, without any notice to the stockholders represented by him; that because of said adjournment of the court, there has been no day since said 6th day of June that your orators could lay their grievances before the court; that the master advertised the premises to be sold upon the 6th day of September,

1876, and at the time and place named in said advertisement he received proposals for the purchase of the mortgaged premises, which proposals he submitted to this court for its confirmation; that the Andrew Pierce who bid in said road at said master's sale on September 6th, 1876, purchased the same for James Baker, who is the solicitor of record of the defendant, Pacific Railroad, and a director in said railroad corporation; that said Pierce was also a director and general manager in said corporation until after the commencement of the original foreclosure suit, and until about the time said decree of sale was made, and that he is the same Pierce that is charged in said bill of said Cowdrey, and in the answers and cross-bills of said county of St. Louis, and of Thomas P. Akers, esq., as being the general manager and director of the defendant, the Pacific Railroad, and as having illegally combined and conspired with others to wrong the stockholders of said Pacific Railroad by issuing said third mortgage, and then instituting a suit in the name of said Ketchum to foreclose the same, to the utter destruction of the stock interest in said Pacific Railroad. And that the said James Baker, solicitor of said Pacific Railroad, is the same person that, as such solicitor, consented to said decree, and was one of the sureties of said Pierce for the payment of $200,000
87 to the master, as required by said decree; and that he is one of the defendants in said Cowdrey bill, and charged in said bill and in the answer and cross-bill of the county of St. Louis, and of Thomas P. Akers, as combining and conspiring with others to wrong and defraud the stockholders of said Pacific Railroad, by whom he was elected a director or trustee, to represent and to act for them.

7th. Your orators further aver that at the annual meeting of the stockholders of the defendant, the Pacific Railroad, held in St. Louis, March 27th, 1876, the stockholders unanimously passed the following resolution:

"Resolved, That the stockholders respectfully request the directors to employ Messrs. Glover & Shepley to aid in defending the company in foreclosure suits now pending against it (this suit), and also the proceedings in bankruptcy pending against the company."

That the directors, in bad faith to the stockholders, and without any notice to the stockholders, continued the employment of James Baker, esq., who, on the 6th of June, 1876, consented to said decree as counsel for the company.

8th. Your orators further show that the decree of sale made by this court on the said 6th day of June, 1876, was improvident and illegal, and should be set aside, because, as your orators aver, the said decree provided as follows: "That in case said road, property, and franchises shall be purchased by bondholders, or by trustees for bondholders, then at any time within sixty days after said sale any bona fide holder or holders of said third-mortgage bonds, secured by the mortgage sued on in this case, shall be allowed to become associated with said original purchaser or purchasers in the property purchased in the proportion that the bonds so held by him or them bears to the whole number of bonds issued, upon the same terms and conditions, with the same rights, subject to the same burdens, and under the same scheme as may be
88 provided for or agreed upon by said original purchaser or purchasers for the purchasing and managing the property purchased, or for creating a corporation to which said property may be conveyed, provided that at the time of his election to share in such purchase he shall pay his proportion of the money and expenses paid by the original purchaser."

Your orators aver that the above improvident provision in said decree had the direct effect to deter bidders at said master's sale; that if any person desiring to purchase the premises, and owning five or ten bonds, bid at such sale and furnished the entire money, as required by said decree, he might be required, sixty days after he had put up said money, to accept strangers as copartners with him in said purchase, in the proportion as $5,000 of bonds, if he owned that amount, bears to $4,000,000, the whole amount of the mortgage—that is to say, his interest in the purchase would be reduced to one-eighth of one per cent., or say, 1-800th part, and he would temporarily have to furnish all the money with which to make the purchase. Your orators believe and allege that few, if any, sane business men or capitalists would compete at a foreclosure sale made upon that principle.

9th. Your orators further aver that said decree of June 6th is improvident and illegal, because they say that it does not find any fixed amount of debt to be due the complainants, but leaves the same unsettled and undetermined; if by implication it finds it to be the amount of the principal and interest, then your orators aver that the complaint in this case, by the exhibit attached thereto, the same being a copy of the mortgage which this court is asked to foreclose, shows that the principal of said debt, viz, $4,000,000, is not due until May, 1895; that the complaint and the decree itself shows that the whole amount of $4,000,000 was not issued, but that millions of dollars were held to be exchanged for income and improvement bonds, which your orators aver may never be exchanged, and, whether they are or not, the court should, by its master, find the exact amount of the debt due them, secured by said mortgage for which the foreclosure sale was ordered to be made; that the
89 court improvidently and illegally omitted to require an account from its receivers, to the end that what money was then or was likely before the sale to come into their possession might be applied in liquidation of the debt.

Your orators aver that the court in said decree of the 6th of June, 1876, has omitted to find the necessary facts upon which to base said decree as required by the laws of the United States and by the rules of the Supreme Court of the United States applicable to this cause.

Your orators aver that said decree, made June 6th, 1876, is improvident and illegal, in this, that it wholly fails to give the Pacific Railroad any time within which to pay such or whatever debt is or ought to have been found to have been due; but declares said Pacific Railroad to be absolutely debarred and foreclosed of and from all equity of redemption in and to said mortgaged premises. Whereas, as your orators aver, the said decree should have fixed some reasonable time in the future within which said Pacific Railroad might pay the debt established by the court, if any such debt was established, or thereafter to be barred and foreclosed.

For which reason said decree should be vacated, set aside, and for nothing had.

Your orators aver that by the 16th section of the constitution of State of Missouri, "the rolling stock and all other movable property belonging to any railroad company or corporation in this State shall be considered personal property;" that the mortgage on which this suit is brought purports to embrace all the rolling stock, equipment, and supplies owned by said Pacific Railroad Compa'y, which the constitution declares to be personal property.

Your orators aver, upon information and belief, that said mortgage was never recorded as the laws of the State of Missouri requires that

mortgages of personal property should be recorded; and hence they say that said decree of July 6th, 1876, should be set aside, and for
90 nothing had, because it embraces personal property, concerning which the law has not been complied with.

10th. Your orators aver that this cause and the decree therein, entered June 6th, 1876, is one "where a writ of error may be a supersedeas," and that by the laws of the United States an execution could not issue thereon until the expiration of sixty days from the entry of said decree, which would be on and after August 7th, 1876, the 6th of August being Sunday; that notwithstanding said law the master issued and advertised his order to sell said premises—which in equity is an execution—on and before June 22d, 1876, which is only sixteen days after the entry of said decree, thus disregarding the law of the United States requiring sixty days to have elapsed after the entry of decree and before the issue of execution.

11th. Your orators aver that said decree, made June 6th, 1876, is in violation and in total disregard of the statute of the United States, which, by the 983d section of the Revised Statutes, requires "the bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of the judgment or decree against the losing party;" that said decree, made June 6th, 1876, wholly omits to tax costs in favor of the prevailing party, as required by said statute. Wherefore, your orators say that said decree is illegal, and should be set aside and for nothing had.

12th. Your orators aver that in addition to the many and divers reasons why said bonds upon which said complaint is brought are not a valid debt or a lien upon the property now in the possession of the court, upon information and belief, they allege that the said Pacific Railroad had deposited a large number of said bonds upon which this suit was brought, your orators believe about $2,500,000, with certain national banks organized under the laws of the United States, among others
91 the National Bank of Commerce of the city of New York, which national banks, contrary to law, made loans upon said bonds. Now your orators aver that banks organized under the national banking law are only authorized to lend money upon personal security, and that they are not authorized to lend upon real-estate securities; that railroad bonds are real-estate securities; that said banks sold said bonds to the amount of about $1,400,000 to C. K. Garrison, one of the parties to this suit; that said Garrison and other present holders took them with full knowledge of the defect in the title to said bonds in said banks, knowing that the banks could give no better title to said bonds than they themselves had, and that the courts had construed this law, saying that the national banks could neither take or give title to railroad bonds or other real-estate securities (see Fowler vs. Scully, 72 Penn. Rep., p. 456); that other amounts of said bonds were sold by said banks to others than Garrison, who now claim to hold said bonds as a valid lien against the Pacific Railroad, defendants; that because of said defect in title, said Garrison and others were enabled to get said bonds at one-half their nominal or par value; that all or neaaly all of the present holders of said bonds have acquired them since this suit was commenced, and since the court appointed its receiver to take care of said premises, hence the said bonds are now, and at the time said decree of June 6th, 1876, was entered, are held by the present owners, sub-

ject to all the equities existing between the makers and the holders thereof at the time said suit was commenced, and at the time of the appointment of receivers by the court.

13th. Your orators aver, that previous to the rendition of said decree of June 6th, 1876, the county of St. Louis, on its own behalf, as a creditor and a stockholder of said Pacific Railroad, and Thomas P. Akers, esq., as a stockholder on his own behalf, and on behalf of all other stockholders, each filed their cross-bill and answer to the complaint in this case, and that they each and both withdrew the same on the day said decree was rendered. Your orators pray that they may be allowed to refer to said answers and cross-bills as if the same were now pending, and as if they were set out at length in this motion.

92 14th. Your orators aver, that on or about the 2d day of February, 1876, they authorized and procured N. A. Cowdrey, one of the present petitioners for liberty to intervene in this cause, to commence a suit by bill in equity in this court, against the Pacific Railroad, the Atlantic & Pacific Railroad Company, Andrew Pierce, of the city of Boston, C. K. Garrison, of New York, and Henry F. Vail and James D. Fish, to whom the mortgage sought to be foreclosed was made in trust to secure the payment of the bonds, and others, directors in said Pacific Railroad, and directors in said Atlantic & Pacific Railroad Company.

That said suit is now pending in this court; that said bill alleges fraud and collusion in the making and issue of said $4,000,000 of bonds on which this suit of foreclosure is brought, commit'ed by Andrew Pierce and others against the stockholders of said Pacific Railroad; that the bill prays, among other things—

For an account to be stated between the Pacific Railroad and the Atlantic & Pacific Railroad Company, the complainant, alleging an indebtedness from the Atlantic Railroad Company to the Pacific Railroad of $3,000,000, and upwards.

For an account to be stated between the Pacific Railroad and Andrew Pierce, Joseph Seligman, and Jesse Seligman, alleging an indebtedness from them to said Pacific Railroad.

For a cancellation of the outstanding income, improvement, and third mortgage bonds, alleging the same to have been issued in fraud of the rights of the stockholders of the Pacific Railroad.

For such other and different relief as to equity appertains.

Your orators humbly pray the court to allow them to refer the said bill in equity in said Cowdrey case, the same as if it were set out here at length.

15th. Your orators humbly pray the honorable court to take their cause into consideration, and upon finding their allegations and averments to be true, to make an order of this court that your ora-

93 tors may be allowed to intervene as parties defendants in this cause, and they be authorized to make answer, plead, demur, or to appeal as they by their counsel shall be advised; and that the decree of June 6th, 1876, and sale thereunder, be set aside and for nothing had. Or that you will grant such other relief as to equity appertains.

Certain interlineations at folio 22 were made herein before affi lavit made hereto.

And your orators as in duty bound will ever pray.

GLOVER & SHEPLEY,
Solicitors.

NEW YORK, *September* 19, 1876.

NEW YORK CITY AND STATE,
September 19*th*, 1876.

Personally appeared before the undersigned authority, authorised by act of Congress to administer oaths in such cases, N. A. Cowdrey and Robert L. Cutting, jr., who each being by me duly sworn, made oath that the foregoing instrument or petition is true of their own knowledge, except those matters charged upon information and belief, and that they believe them to be true.

N. A. COWDREY.
R. L. CUTTING, JR.

[SEAL.] CLARENCE M. HYDE,
Notary Public for the City and County of New York.

94 And at the September term of said court, on the 3d day of October, 1876, the following further proceedings were had in said cause, to wit:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

This day come the said parties by their solicitors, and also come N. A. Cowdrey and others, by their solicitors, Messrs. Glover & Shepley, and the motion of said Cowdrey and others for liberty to intervene to set aside the decree and sale herein was argued by counsel and submitted to the court; on consideration whereof, and being fully advised in the premises, it is ordered by the court that said motion be denied.

It is further ordered that the motion of N. A. Cowdrey and others for leave to file a petition to set aside the decree of foreclosure and sale thereunder for want of jurisdiction, be, and the same is hereby, denied.

95 And afterwards, at said term of court, and on the 3d day of October, 1876, the following proceeding' were had in the said matter of Mary Robb Miltenberger, to wit:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

This day come the said parties by their solicitors, and also comes Mary Robb Miltenberger, by her solicitors, Messrs. Glover & Shepley, and the motion of said Miltenberger for liberty to intervene to set aside the decree and sale herein, coming on to be heard, was argued by counsel and submitted to the court; on consideration whereof, and being fully advised in the premises, it is ordered by the court that said motion be denied.

It is further ordered that the motion of Mary Robb Miltenberger for leave to file petition to set aside decree of foreclosure and sale thereunder, for want of jurisdiction, be, and the same is hereby, denied;

96 and thereupon the said Mary R. Miltenberger, by her said solicitors, makes application for an order allowing an appeal to the Supreme Court of the United States, from the said orders of this court, which being submitted and heard, it is ordered that said application be denied.

97 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States in and for said district.

Be it remembered that on the 23d day of October, A. D. 1876, at a regular stated term of the circuit court of the United States in and for the eastern district of Missouri, begun and holden at the city of St. Louis, in said district, on the 18th day of September, 1876, the following among other proceedings were had, to wit:

Order requiring Baker to pay $50,000, *and to give bond for* $550,000. *Made Oct. 23d*, 1876.

GEORGE E. KETCHUM ET AL, COMPLAINANTS,
vs.
THE PACIFIC RAILROAD ET AL., DEFENDANTS.

In the above entitled cause, on motion of complainants, by their solicitor, James O. Broadhead, esquire, it appearing to the court that James Baker, the purchaser of the railroad and other property heretofore ordered to be sold, represents as said purchaser bona fide bondholders, as in the decree heretofore entered in this cause is specified:

It is ordered that said Baker pay into the registry of this court, in cash, the sum of fifty thousand ($50,000) dollars, and execute a bond, with security to be approved by the court, in the sum of five hun-
98 dred and fifty thousand ($550,000) dollars, to secure the payment of such sums as may from time to time be ordered by this court in pursuance of the terms of said sale.

And thereafter, on said 23d day of October, A. D. 1876, the following further proceedings were had in said cause, as appears of record, to wit:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

Now again comes James O. Broadhead, esquire, solicitor for the complainants in said cause, and James Baker, esquire, the purchaser of the property under the decree of foreclosure heretofore made in this case; and it appearing to the court that said James Baker has paid into the registry of this court the sum of fifty thousand dollars, as heretofore ordered by this court, and also that the said Baker has delivered to Seymour D. Thompson, esquire, master in chancery of this court, who made said sale, three thousand nine hundred and forty-eight third mortgage bonds in behalf of certain third mortgage bondholders represented by him, in part payment of the purchase of said property under the previous decrees of this court, and the said Baker having also given and filed in this court his bond in the sum of five hundred and fifty thousand ($550,000) dollars, with Cornelius K. Garrison, Darius R. Mangam, and Charles P. Chouteau as sureties, conditioned as required by the court; and said parties to said bond having, in open court, jointly and severally acknowledged themselves and each of them to be bound to perform each and all of the obligations of said bond as therein recited, which said bond has been approved by the court, and is in words and figures following, to wit:

99 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the district court of the United States in and for said district. In chancery.

GEORGE E. KETCHUM AND ALS.
vs.
THE PACIFIC RAILROAD AND ALS.

Whereas by the judgment and decree of the circuit court of the United States in and for the eastern district of Missouri, had on the sixth day of June, A. D. 1876, in the above-entitled cause, Seymour D. Thompson, master in chancery, was ordered to sell the road and its appurtenances, and the franchises and other property of the said "Pacific Railroad," in said judgment mentioned, and on the terms therein specified;

And whereas, in pursuance of said judgment, decree, and order, the said road and property was, on the 6th day of September, A. D. 1876, sold by the said master to James Baker for the sum of three millions of dollars ($3,000,000), which said sale has been approved by this court;

And whereas a large portion of said purchase price has been paid by said purchaser, by the delivery to said master of three thousand nine hundred and forty-eight (3,948) bonds of the issue of the so-called third-mortgage bonds of the "Pacific Railroad," in accordance with the terms of said order of sale;

And whereas by the terms of said judgment, decree, and order of sale, it was provided that in addition to the sum of two hundred thousand dollars ($200,000) therein required to be paid, and for which a
100 bond in the last-named amount has been given by the purchaser, as provided therein, it was also provided that further sums of moneys should be paid by the purchaser in cash as might be required and ordered by the court:

Now, therefore, for the purpose more effectually of carrying out the object of said last-named judgment, decree, and order on the part of the purchaser, and of providing and securing the payment of such equitable claims as are contemplated by said order to be paid, and the payment of the pro rata proportion of the outstanding third-mortgage bonds not delivered by the purchaser to said master, and also for the purpose of meeting and liquidating the outstanding liabilities incurred by the receivers of the said railroad and property and the costs and expenses of this suit,

We, the undersigned, James Baker, as principal, and Cornelius K. Garrison, Darius Mangam, and Chas. P. Choteau, as his securities, are held and firmly bound unto Seymour D. Thompson, master in chancery, in the sum of five hundred and fifty thousand dollars ($550,000) well and truly to be paid.

Conditioned, that if the said James Baker shall abide by the terms of said decree of sale, and pay such sums of money, not exceeding in the aggregate the sum of five hundred and fifty thousand dollars, as may, from time to time, be awarded against him by any interlocutory or final decree or order of this court in said cause, then this obligation to be void, otherwise to remain in full force and effect. And in default of payment as aforesaid, within ten days after demand therefor, by the person or persons in whose favor said order of court may be made, said obligors herein hereby consent that judgment may be entered against them jointly

and severally for the respective sums so ordered to be paid, and in favor of the person or persons to whom the same may be payable, and that execution may issue thereon.

In witness whereof we hereunto severally sign our names and affix our seals this the 23d day of October, A. D. 1876.

JAMES BAKER. [SEAL.]
C. K. GARRISON. [SEAL.]
DARIUS R. MANGAM. [SEAL.]
CHAS. P. CHOTEAU. [SEAL.]

101 It is, therefore, ordered that said bond be filed among the records of the court in this case.

It is further ordered, that the bond for the sum of two hundred thousand ($200,000) dollars heretofore given by James Baker and others in accordance with the order of sale in this cause be and the same is hereby cancelled.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States, in and for said district.

Be it remembered, that on the 24th day of October, A. D. 1876, at a regular stated term of the circuit court of the United States, in and for the eastern district of Missouri, begun and holden at the city of St. Louis in said district, on the 18th day of September, 1876, the following, among other proceedings, were had, to wit:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
THE PACIFIC RAILROAD ET AL., DEFENDANTS.

Now come the complainants by their attorney, James O. Broadhead, esq., and James Baker, esq., and Seymour D. Thompson, esq., master in chancery, and it appearing to the court that the property and franchises hereinafter described have been duly sold in accordance with the decree and order of the court heretofore made and rendered in this case, and that the conditions of said sale have in all respects been duly complied with by the said James Baker, the purchaser of said property, and that he is entitled to a deed thereof; and Seymour D. Thompson, esq.,
102 the master in chancery, who made said sale, having submitted to the court a deed in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri:

This indenture, made in triplicate this twenty-fourth day of October, A. D. 1876, by and between Seymour D. Thompson, esquire, a master in chancery of the United States circuit court, for the eastern district of Missouri, duly appointed and qualified as such, party of the first part, and James Baker, esquire, as party of the second part, witnesseth:

That whereas the Pacific Railroad, a corporation chartered and existing under and by virtue of the laws of the State of Missouri, did, on the 10th day of July, A. D. 1875, make and deliver to Henry F. Vail and James D. Fish, trustees, its mortgage or deed of trust, of that date, by which the said Pacific Railroad did convey and mortgage to the said Vail and Fish all the property, real and personal, rights, interests and

franchises of the said Pacific Railroad, to secure certain bonds therein mentioned and described, as set forth in the said mortgage, and which is hereinafter more particularly described;

And whereas George E. Ketchum, a holder of certain of the bonds secured by said mortgage, did on the eleventh day of November, A. D. 1875, exhibit his bill of complaint in the circuit court of the United States, in and for the district aforesaid, praying that the equity of redemption in and to the property, interests, and franchises embraced in said mortgage or deed of trust, be forever barred and foreclosed, and that said property, interests and franchises be sold to enforce the lien of the same, and to satisfy the debt thereby secured;

And whereas such proceedings were had under the said bill of complaint in said court that, at an adjourned term thereof, and on the sixth day of June, A. D. 1876, a decree was entered thereunder—the name and style of the said cause being "George E. Ketchum et al., complainants, against the Pacific
103 Railroad et al., defendants, No. 703, in equity"—that the said Pacific Railroad should stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises, property and franchises, and that the Pacific Railroad property, together with the franchises and appurtenances of the said railway company as in said deed of trust or mortgage, dated July 10, 1875, is described, should be sold at public auction by the undersigned, Seymour D. Thompson, master in chancery of said court, to pay and satisfy the amounts due by said Pacific Railroad upon said bonds and any other indebtedness which the court might order to be paid out of the proceeds of said sale, together with the costs of said suit and of sale, including the services of said trustees, and their solicitors' and attorneys' fees in and about the management of said trust, as might thereafter be ordered by the court; and which decree further provided that, upon said sale, the said master should execute a certificate stating such sale and setting out the terms and conditions thereof, and that he should report said sale and the terms and conditions thereof immediately after said sale to the court; and that upon the terms of such sale being complied with, and the sale approved and confirmed by the court, said master should be, and he was by said decree authorized and directed to execute and deliver to the purchaser or purchasers of said property a good and sufficient deed or deeds for the same;

And whereas it was further provided in said decree that upon the sale of said road, property and franchises, the undersigned, Seymour D. Thompson, master, should require the payment by the purchaser of the sum of at least two hundred thousand dollars in cash, or the delivery to him of a good and sufficient bond with sureties to be by him approved, for the payment of such sum of two hundred thousand dollars, when and as soon as thereto required by the court;

And whereas it was further ordered and decreed that the terms and conditions of said sale should be the payment of said sum of two hundred thousand dollars cash, or the execution and delivery of the bond thereinbefore specified, on the delivery of the certificate of sale by said master, and that the balance of the sum bid should, unless the
104 purchaser were a bondholder, or should represent bondholder, be paid in cash at the confirmation of said sale, should said sale be confirmed; and if said purchaser should be a bondholder, or represent bona fide bondholders, then and in that event, should said sale be confirmed, that he should pay, or cause to be paid, in cash, said sum of two hundred thousand dollars, and also the pro rata portion from the pro-

ceeds of such sale, which might be by the said court then found due, to the other bona fide bondholders; and that the balance after such cash payment might be paid in bonds, bona fide owned or represented by him, the court expressly reserving for future considerations all questions as to the rights, priorities and interests of all parties claiming any interest herein by way of bonds or otherwise;

And whereas it was further ordered in said decree, that the undersigned, master in chancery, should designate the time of making such sale, and should advertise the same, together with a description of the property and franchises to be sold, by publication showing the time, terms and place of sale and the property and franchises to be sold, to be inserted in the St. Louis Globe-Democrat, published in the city of St. Louis, Missouri, in the Evening Post, published in the city of New York, and in the Boston Journal, published in the city of Boston, for the period of sixty days in each of the said newspapers, the same to be inserted in each of said newspapers once a week during the first three weeks of said period, three times a week during the second three weeks of said period, and once every secular day during the remaining portion of said period of sixty days, the last insertion to be at least two weeks before the day of such sale;

And whereas it was further ordered, adjudged and decreed in said decree, that all the premises, property and franchises covered by, and embraced in, the said mortgage sued on, viz: the mortgage dated July 10, 1875, should be sold in a body and not separately, so that the purchaser or purchasers at said sale should acquire the whole of the property, premises and franchises embraced in said last-named mortgage, subject to all prior mortgages;

And whereas it was further ordered, adjudged and decreed in said decree, that in case said road, property and franchises
105 should be purchased by bondholders, or by trustees for bondholders, then at any time within sixty days after said sale, any bona fide holder or holders of said third mortgage bonds, secured by the mortgage sued on in said cause, should be allowed to become associated with said original purchaser or purchasers in the property purchased, in the proportion that the bonds held by him or them should bear to the whole number of bonds issued, upon the same terms and conditions, with the same rights, subject to the same burdens and under the same scheme as might be provided for or agreed upon by said original purchaser or purchasers, for the purchasing and managing the property purchased, or for creating a corporation to which said property might be conveyed, provided that at the time of his election to share in said purchase he should pay his proportion of the money and expenses paid by the original purchaser;

And whereas it was further ordered, adjudged, and decreed that nothing in said decree contained should be construed to prejudice in any manner the claim of the county of St. Louis to a lien on the property and franchises of the said Pacific Railroad, alleged by the said county to exist, as fully appeared by the amended petition in said cause filed by the said county for securing the payment of a certain debt of the said Pacific Railroad to said county for the sum of seven hundred thousand dollars and interest thereon, and alleged and claimed by the said county of St. Louis to be a prior lien therefor over all other incumbrances upon said property and franchises, the question of the existence and priority of said lien to be thereafter determined by the court, if not otherwise satisfactorily adjusted;

And whereas it was further ordered and decreed in said decree that

nothing therein contained, or proceedings had in said cause should in any manner affect the rights of the Boonville Branch Railroad, otherwise known as the Osage Valley and Southern Kansas Railroad Company, Boonville Extension, or its rights to rent therefor;

And whereas it was further ordered, adjudged, and decreed in said decree that any party purchasing under said decree should, in
106 addition to the two hundred thousand dollars provided to be paid as above, pay in cash such further sum not exceeding two hundred thousand dollars, as and when this court might require and direct to be paid, for the purpose of satisfying any statutory, equitable, or other lien claims that had been or might be filed in said cause, or in the case of Calvin Littlefield v. The Atlantic and Pacific Railroad Company and others, pending in said court, and which had been or might thereafter be directed by the court to be paid by the receivers or either of said companies, and which, on a hearing and final accounting had between the receivers of the said Atlantic and Pacific Railroad Company and the receivers of the Pacific Railroad, in respect to said liens and payments, might be found to be due and owing to the receivers of the said Atlantic and Pacific Railroad Company;

And whereas I, the undersigned, master in chancery, did, in pursuance of the terms of said decree, designate Wednesday, the sixth day of September, A. D. 1876, between the hours of eight o'clock a. m. and four o'clock p. m. as the time of making such sale, and did advertise the same, together with a description of the property and franchises to be sold by publication showing the time, terms and place of sale, and the property and franchises to be sold, which advertisement was inserted in the St. Louis Globe-Democrat, published in the city of St. Louis, Missouri, in the Evening Post, published in the city of New York, and in the Boston Journal, published in the city of Boston, for the period of sixty days, in each of said newspapers, beginning on Thursday, the twenty-second day of June, A. D. 1876, and ending on Tuesday, the twenty-second day of August, A. D. 1876, the said advertisement having been inserted in each of said papers once a week during the first three weeks of said period, three times a week during the second three weeks of said period, and once every secular day during the remaining portion of said period of sixty days, the last insertion having been at least two weeks before the day of such sale;

And whereas proof of publication of the said advertisement, as required by said decree, was duly made and lodged with the undersigned, in conformity to the statute of the State of Missouri, in such cases made and provided, which proof was duly filed by the undersigned,
107 master in chancery, among the papers in said cause in the office of the clerk of said court, as an exhibit to his report of said sale, as hereinafter named;

And whereas I, the undersigned, master in chancery, did on the sixth day of September, A. D. 1876, at the hour of twelve o'clock meridian, at the east door of the court-house in the city of St. Louis, Missouri, after reading to the persons there assembled a duly certified copy of the decree aforesaid, and also a copy of the said advertisement, expose to sale at public auction, in a body not separately, and subject to all prior liens and mortgages, as provided for in said decree, all the property, rights, interests, and franchises of the said Pacific Railroad (of Missouri) described in the said mortgage or deed of trust, dated July 10, 1875, made by said Pacific Railroad to Henry F. Vail and James D. Fish, trustees, and hereinafter more particularly described;

And whereas James Baker, the party of the second part herein named,

did then and there bid for the said property, franchises and estate, subject to all prior liens and mortgages, as provided in said decree, and subject also to all the terms, limitations and conditions named in said decree, the sum of three million dollars ($3,000,000), and he being the highest and best bidder, and no other person, after full and fair notice given, being willing to offer any advance upon said bid, the said property, franchises and estate were then and there sold to him, the said John Baker, subject to all prior liens and mortgages, as provided in said decree, and subject also to all the terms, limitations, and conditions named in said decree and hereinbefore set forth;

And whereas the said James Baker did thereupon sign an acknowledgment of the fact and amount of his said bid, and did then and there execute and deliver to the undersigned, master in chancery, a bond to secure the payment of the sum of two hundred thousand dollars, as provided for in the said decree, and the said James Baker and the sureties whose names appear on said bond did acknowledge their signatures and seals to the same in the presence of the undersigned, and the said bond was by the undersigned found to be a good and sufficient bond to secure the sum in question, and was therefore approved by the undersigned;

108 And whereas afterwards, to wit, on the 15th day of September, A. D. 1876, I, the undersigned, master in chancery, did lodge, in the office of the clerk of said court, my report of said sale, addressed to the judges of the said court, and setting forth fully my doings under the said decree;

And whereas afterwards, to wit, on the seventh day of October, A. D. 1876, a decree was entered in the said cause, reciting that the said sale was in all respects regular and in accordance with the terms and requirements of said decree and ordering that the same be confirmed;

And whereas the said James Baker, party of the second part, did on the 20th day of October, A. D. 1876, deliver to the undersigned in part payment of his said purchase three thousand nine hundred and forty-eight (3,948) bonds of the Pacific Railroad, known as third mortgage bonds, for the payment of one thousand dollars ($1,000) each, dated July 10th, 1875, signed by Samuel Hays, president of the Pacific Railroad, and countersigned by J. L. Dearborn, treasurer of the said corporation, and sealed with their corporate seal; and did on the 23d day of October, A. D. 1876, pay into the registry of the court the sum of fifty thousand dollars ($50,000) in cash, and did on the same day enter into a bond with sureties then and there by the court approved to pay such further sum, not exceeding five hundred and fifty thousand dollars ($550,000), whenever required by the court, and in such instalments as the court should require;

And whereas such payments of bonds and of money and the giving of such bond were accepted by the court as a compliance on the part of the said James Baker, party of the second part, with the terms and conditions of said sale, it having been adjudged by the court that he purchased the said property, franchises and estate as the representative of bona fide bondholders;

And whereas, on the twenty-third day of October, A. D. 1876, an order was entered in said cause requiring the undersigned, master in chancery, to make and deliver to the said James Baker, party of the second part, this deed of conveyance of the property, franchises and estate embraced in said mortgage, decree and sale, the court having first approved said deed in substance and in form:

109 Now, therefore, in consideration of the premises and by virtue

of the powers vested in me by my said office of master in chancery of said court, and by the decrees and orders aforesaid, and in obedience to the said decrees and orders, and in order to give effect to the same, I, the said party of the first part, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey unto the said James Baker, party of the second part, his heirs and assigns, forever, subject to the terms, limitations, and restrictions enumerated in said decree of June sixth, 1876, all the right, title, interest, and estate of the Pacific Railroad in and to the property and franchises embraced in the deed of mortgage, bearing date of July the tenth, A. D. 1875, as aforesaid, and also as described in said decree of foreclosure and sale and in the advertisements of said sale as aforesaid, as follows, that is to say:

1. All and singular the entire line of the Pacific Railroad (of Missouri), two hundred and eighty-three miles in length, extending from the depot at Seventh street, in the city of St. Louis, State of Missouri, to the western boundary of said State, at Kansas City, and passing through the counties of St. Louis, Franklin, Gasconade, Osage, Cole, Monitau, Morgan, Cooper, Pettis, Johnson, Cass, and Jackson, in said State of Missouri, with its appurtenances, including, among other things the track on Poplar street and the levee in the city of St. Louis, commonly known as "the Poplar street track," and including the real estate, depots, stations, machine shops, rolling-stock, machinery, rights and interests, and franchises of the said railroad company, subject to the liens of the two mortgages described in the said bill of complaint, severally executed by said Pacific Railroad, one of which was so executed to Murdock, Punnett and Clark, and the other of which was executed to Edwin D. Morgan and Joseph Seligman.

2. All and singular the following described real estate in the city of St. Louis, State of Missouri, viz: Four blocks of ground in the city of St. Louis, being city blocks numbered four hundred and eighteen, four hundred and twenty-three, four hundred and twenty-eight, and four hundred and thirty-three, bounded east by Seventh street, south
110 by Cerre street, west by Eleventh street, and north by Poplar street; also, block number two hundred and thirteen, of the city of St. Louis, bounded east by twelfth street, south by Austin street, west by Fourteenth street, and north by Randolph street, saving and excepting therefrom lots 26, 29, 33, and 34, the north one-half of lot number 36, and part of lot number 25, embracing the southwest corner of said block, sixty-six feet eight inches on Fourteenth street, by one hundred feet on Austin street.

Also, the following described real estate in city block number four hundred and thirty-eight, viz:

Beginning at the northwest corner of Eleventh and Cerre streets, in the city of St. Louis, the southeast corner of said block; thence west along the north side of Cerre street one hundred and fifty-two feet and six inches, more or less, to an alley; thence north one hundred feet; thence east parallel to Cerre street one hundred and fifty-two feet and six inches to Eleventh street; thence southerly on the line of Eleventh street to the place of beginning.

Also, the following, viz: Commencing at the southwest corner of city block number four hundred and thirty-eight, the northeast corner of Twelfth and Cerre streets; thence north one hundred and four feet and six inches; thence east one hundred and fifty-two feet and six inches to an alley; thence south one hundred and four feet six inches to Cerre

street; thence west one hundred and fifty-two feet six inches to Twelfth street, the place of beginning.

And also the following-described tract or parcel of land, viz: Commencing at the northwest corner of city block number four hundred and thirty-nine, the southeast corner of Twelfth and Cerre streets; thence south one hundred and seventy-six feet, more or less, to the south line of property of the Pacific Railroad; thence eastwardly, along said south line, to the northeast corner of said block four hundred and thirty-nine; thence along the south line of Cerre street to the place of beginning; being the same property mentioned and described in said bill of complaint as covered by the mortgage executed to Lackland and Durkee, and said premises being conveyed subject to the lien of said last-mentioned mortgage.

111 3. All and singular the branch railroad of the said Pacific Railroad, constructed and operated and extending from a point on the main line at or near Kirkwood; thence to the termination of the said railroad at the Mississippi River at Carondelet or South St. Louis, with its appurtenances, including the depots, stations, machine-shops, superstructures, and erections on the line of said branch railroad, or at Carondelet aforesaid, together with all the side-tracks and switches connected with said branch railroad, and also all the lands acquired and appropriated, or that may be acquired or appropriated, for depots, engine-houses, car-houses, station-houses, warehouses, machine shops, or other superstructures and erections on the line of said branch railroad, or at Carondelet aforesaid; which said last-mentioned premises and property were so mortgaged, subject to the lien of a mortgage to Jesse Seligman and James Baker, described in the bill of complaint.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and all the reversions, remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever, either in law or in equity, of the said Pacific Railroad, and of the said Vail and Fish, trustees, in and to the above described premises, and their hereditaments and appurtenances, which the undersigned is, by virtue of the various decrees and orders hereinbefore enumerated, entitled to convey:

To have and to hold the same unto the said James Baker, party of the second part, his heirs and assigns, to his and their only proper use and benefit forever.

In testimony whereof the party of the first part, as master in chancery of said court, has hereunto set his hand and seal the day and year first above written.

[SEAL.] SEYMOUR D. THOMPSON,
Master in Chancery of said Court.

112 And it further appearing to the court that the said deed is correct in form and substance, and that all the recitals in said deed contained are true and correct; now, therefore, it is ordered and decreed that the said Seymour D. Thompson, master in chancery, do execute, acknowledge, and deliver to the said James Baker a deed in triplicate, in tenor and form as submitted to the court and hereinbefore set forth, of the said property and franchises, and upon the delivery of said deed the receiver' heretofore appointed by the court in this case are authorized and directed to turn over said property to the said Baker, or his assigns, taking a proper inventory thereof and a receipt therefor.

And afterwards, to wit, on the 25th day of October, of said term, the following appears of record in said cause, to wit:

GEORGE E. KETCHUM ET AL., COMPLAINANT,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

Be it remembered that on this 25th day of October, A. D. 1876, appears in open court Seymour D. Thompson, esquire, master in chancery of this court, and acknowledges that he execute' and delivers the deed filed in this cause on the 24th day of October, A. D. 1876, to the grantee therein named, under the orders of this court hereinbefore cited, and for the uses and purposes in said deed and in said orders named.

113 And afterwards, to wit, at the September adjourned term, 1876, of said court, the following proceedings were had in said cause on the 6th day of February, 1877, to wit:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

This day comes the defendant, the Pacific Railroad, by its solicitors, Messrs. Glover & Shepley, and presents to the court a petition for an appeal in this cause to the Supreme Court of the United States, which was presented to the honorable Samuel F. Miller, associate justice of the Supreme Court, and an order allowing said appeal.

On motion of said solicitors, it is ordered that an appeal be allowed in this cause to the Supreme Court of the United States, and the clerk of this court is directed to make out and certify a full and complete transcript of the record and proceedings in this cause, and transmit the same to said Supreme Court.

And the said solicitors also present and file a bond for an appeal, which said bond was approved by the honorable Samuel F. Miller, associate justice of the Supreme Court of the United States.

The said petition for an appeal, so filed as aforesaid, is in the words and figures following, to wit:

Petition of the Pacific Railroad of Missouri for an appeal.

114 Circuit court of the United States, eastern district of Missouri.

GEORGE E. KETCHUM, CORNELIUS K. GARRISON, James Seligman, and Thomas W. Pierce, complainants,
vs.
THE PACIFIC RAILROAD (OF MISSOURI), THE Atlantic and Pacific Railroad Company, Henry F. Vail, James D. Fish, trustees, James Baker, The Missouri Pacific Railway Company, and the National Trust Company of New York, defendants.

To the honorable judges of the above entitled court:

The petition of the Pacific Railroad (of Missouri), a corporation in-

corporated by and under the laws of Missouri, and having its principal place of business in the eastern district of Missouri, respectfully show to your honors:

That the above entitled court has made an order or decree of foreclosure and sale in the above entitled cause at a special or adjourned term thereof, held at St. Louis, in said eastern district of Missouri, on the 6th day of June, 1876; that subsequently, viz, on the 6th, 24th, and 25th days of October, 1876, the said court made other orders and decrees, confirming the sale ordered by the decree of June 6th, 1876, to James Baker, the solicitor of your petitioner in said cause, and
115 directed a deed of said premises to be given to said Baker, as more fully appears by reference to said orders and decrees made in said case on file in this court, to which reference is here made; that your petitioner is injured and aggrieved by said orders and decrees above described, and desires to take an appeal therefrom to the Supreme Court of the United States; that this petition is filed and this appeal is taken by the Pacific Railroad in conformity with and in obedience to the order of said Pacific Railroad at its adjourned annual meeting, held at St. Louis Dec. 14, 1876, as more fully shown in its corporate proceedings, a copy of which is hereto attached marked Exhibit A; that said Baker subsequently transferred the premises described in said decree to the Missouri Pacific Railway Company, who now claims to own the same; that said Missouri Pacific Railway Company, on or about the 1st day of November, 1876, mortgaged said premises to the National Trust Company of New York to secure a real or pretended indebtedness of $4,500,000; that said trust company claims a lien upon said premises by reason of said mortgage.

Wherefore your petitioner prays an appeal to the Supreme Court of of the United States from the orders and decrees of said court above described, and that a citation may be issued as required by law.

Your petitioner herewith offers to your honors a bond in due form of law to be approved by your honors.

116 And your petitioner, as in duty bound, will ever pray, &c.

St. Louis, Jan. 27, 1877.

GLOVER & SHEPLEY,
Att'ys for the Pacific Railroad.

The appeal prayed for above is allowed.

SAM. F. MILLER, *Judge.*

FEB'Y 1, 1877.

EXHIBIT A.

Copy of the proceedings of the Pacific Railroad at an adjourned meeting of the stockholders of the Pacific Railroad (of Missouri), held at St. Louis Dec. 14, 1876.

Whereas the charter of the Pacific Railroad and the laws of Missouri authorize the stockholders of said Pacific Railroad, at every annual meeting, to make, alter, or repeal, by a majority of the votes given, any or all by-laws, rules, orders, and regulations made by the directors, and to do and perform every other corporate act authorized by their charter;

And whereas the directors of the Pacific Railroad have allowed their counsel to confess judgment and decree in a foreclosure suit, brought by one George E. Ketchum against said Pacific Railroad and others,

under which decree a sale of the railroad owned by said Pacific Railroad has been had, at which sale said railroad is believed to have been purchased by James Baker, esq., the counsel of said Pacific Railroad, adverse to and against the interest of said Pacific Railroad and
117 of its stockholders;

And whereas said directors neglected and refused to defend said foreclosure proceedings, and neglected and refused to take an appeal therefrom to a higher court, or to have the proceedings therein reviewed, and also refused to allow the stockholders to do either or both in the name of the corporation: Therefore,

Resolved, by the stockholders of the Pacific Railroad, in an adjourned annual meeting, assembled at the city of St. Louis, this 14th day of December, 1876, that for the protection of the interest of said Pacific Railroad and its stockholders, Robert L. Cutting, Jr., George R. Fearing, David Rankin, Jr., Peter Marie, and N. A. Cowdrey, or a majority of them, be and they are hereby appointed a special committee, and the agents of said Pacific Railroad and its stockholders, with full power and authority to commence, prosecute, and defend all and each of any suits at law, or in equity, as they or a majority of them shall think for the interest of said Pacific Railroad, or of its stockholds, should be prosecuted or defended, including the right to take appeals, bring a writ of error, or to make motions in or for a review of any suit heretofore commenced against said Pacific Railroad. To this end the Pacific Railroad hereby authorize and empower said committee, or a majority of them, to employ and to discharge counsel, attorneys, or solicitors; to use the corporate name of said Pacific Railroad for the purposes above named, in such manner and form as they or a majority of them desire, in
118 all places and in all courts, without hindrance or molestation from individual directors, or any other officer of said Pacific Railroad.

And we, the stockholders, hereby revoke any authority heretofore given by the directors of the Pacific Railroad, or by any officers thereof, to use the name of the Pacific Railroad in the suit of George E. Ketchum against the Pacific Railroad and others, now or recently pending in the circuit court of the United States for the eastern district of Missouri, or in any proceedings growing out of said suit, such as an appeal, a writ of error, a bill of review, or answer or demurrer thereto.

And whereas James Baker, esq., the present counsel of the Pacific Railroad, has consented to a decree of foreclosure and sale of the railroad of said company, and at the sale of the same, had under said decree, became the purchaser of said premises adverse to the interest of said Pacific Railroad and to the interest of its stockholders: Therefore,

Resolved, That James Baker, esq., be, and he is hereby, removed from the office of counsel, attorney, or solicitor of said Pacific Railroad, and that all authority for him to act as counsel, attorney, or solicitor of said Pacific Railroad is hereby revoked and withdrawn, and all authority on the part of the directors of this company to appoint counsel, attorneys, or solicitors to act for the company, different from those appointed by the stockholders, is hereby revoked and withdrawn in all matters and things pertaining to the suit of Ketchum, or any appeal, review, or proceedings growing out of said suit.

119 Resolved, That Glover and Shepley be, and they are hereby, appointed the counsel, solicitors, and attorneys of the Pacific Railroad, with full power to use the name of the corporation in the prosecution or defense of all suits, appeals, writs of error, bills of review, or other proceedings growing out of the case of George E. Ketchum and others against the Pacific Railroad and others, whether at law or in

equity, in which the interests of this company are involved, and to employ, under the advice and direction of the special committee appointed by the stockholders, any assistance, or other counsel, solicitors, or attorneys, as they, in connection with said committee, think the interest of the company requires.

Whereas the directors of the Pacific Railroad have neglected and refused to keep open the books of the company for the transfer of the capital stock thereof; and whereas it is desirable and a great convenience to the stockholders of said company to have facilities for the transfer of its capital stock; therefore,

Resolved, That the committee above named, or a majority of them, be, and they are hereby, authorized to appoint, in the name of the company, a proper transfer agent of the company, and to procure proper transfer books and stock ledgers; and they, or a majority of them, are hereby authorized to demand and take possession of all stock
120 ledgers, certificates, and transfer books belonging to said Pacific Railroad wherever the same may be found, and in whosoever's possession the same may be held.

Resolved, That the special committee appointed by the stockholders be, and they are hereby, authorized to fill any vacancies that may occur in their number, and the persons selected by them to fill said vacancies shall have all the power and authority as if appointed at this meeting.

The above resolutions were unanimously adopted at the above named meeting of the Pacific Railroad, and the foregoing are a correct copy thereof.

Attest:

JNO. C. PORTER, *Sec'y.*

And the said bond for appeal is in words and figures following, to wit:

Bond for costs on appeal.

Circuit court of the United States for the eastern district of Missouri.

GEORGE E KETCHUM ET AL.
vs.
PACIFIC RAILROAD ET AL.

Know all men by these presents that we, Robert L. Cutting and Peter Maier, both of the city and State of New York, are held and firmly
121 bound unto the clerk of the circuit court of the United States for the eastern district of Missouri, in trust for the parties to the above named suit, as their interest may appear, in the sum of one thousand dollars, lawful money of the United States, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, jointly and severally.

The condition of this obligation is such that whereas said circuit court of the United States in the suit above named, depending in said court, in equity, viz., on the 6th day of June, 1876, and on the 6th, 24th, and 25th days of October, 1876, made certain orders and decrees by which the defendant, the Pacific Railroad, was injured and aggrieved, as more fully set forth in its petition asking for an appeal from said orders and decrees; and the said defendant, the Pacific Railroad, having asked for and obtained an appeal from said order and decrees to the Supreme Court of the United States, and filed a copy thereof in the

office of the clerk of said circuit court for the eastern district of Missouri, and a citation directed to each of the parties to said suit, citing them to appear at the Supreme Court of the United States to be holden at Washington on the 2d Monday of October, 1877, having been duly issued and filed:

Now, therefore, if said defendant, the Pacific Railroad, shall prosecute said appeal to effect, and answer all damages and costs if
122 said appeal is not made good, then this obligation to be void, otherwise to remain in full force and virtue.

Witness our hands and seals at the city of New York, this 29th day of January, 1877.

R. L. CUTTING. [SEAL.]
PETER MARIE. [SEAL.]

Witness:
WM. H. BOWERS.

Approved by—

SAM. F. MILLER.

FEB'Y 1, 1877.

STATE OF NEW YORK.
City and County of New York, ss:

Personally appeared before the subscribing authority, Robt. L. Cutting and Peter Marie, who are known to me to be the persons who signed the foregoing bond, and each for himself made oath that they are each worth the sum of one thousand dollars and upwards any and above all claims, debts, and liabilities, and that they are owners of unencumbered real estate in the city of New York worth more than the sum of two thousand dollars, and they severally acknowledged to me that they executed the said bond.

Witness my hand and notarial seal.

[SEAL.] WILLIAM H. BOWERS,
Notary Public N. Y. Co.

123 United States of America to George E. Ketchum, Cornelius K. Garrison, James Seligman, Thomas W. Pierce, The Atlantic and Pacific Railroad Company, Henry F. Vail and James D. Fish, trustees, James Baker, The Missouri Pacific Railway Company, and The National Trust Company of New York, greeting:

You are each and every one of you hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, District of Columbia, on the second Monday of October, 1877, pursuant to an appeal filed by the Pacific Railroad, in the office of the clerk of the circuit court of the United States for the eastern district of Missouri, wherein you are complainants and defendants and parties in interest, and wherein the Pacific Railroad is also a defendant, and there show cause, if any there be, why the orders and decrees in said appeal mentioned should not be corrected and speedy justice should not be done the parties to said cause.

SAM. F. MILLER,
Ass. Jus. Sup. Court U. S.

124 STATE OF NEW YORK,
City & County of New York, ss:

Frederic H. Collum, being duly sworn, says that on the 3d day of

February, 1877, he personally placed a copy of the within citation in the hands of each of the within-named parties, viz, Cornelius K. Garrison, James Seligman, Henry F. Vail, Darius R. Mangum, president of The National Trust Company of New York, and James D. Fish, and on the 8th day of February, 1877, he placed a copy of the citation in the hands of the defendant, Thos. W. Pierce.

F. H. COLLUM.

Signed and sworn to before me this 8th day of February, 1877.

E. FRANCIS HYDE,
Notary Public New York City & Co.

125 *Copy of citation.*

United States of America to George E. Ketchum, Cornelius K. Garrison, James Seligman, Thomas W. Pierce, The Atlantic and Pacific Railroad Company, Henry F. Vail and James D. Fish, trustees, James Baker, The Missouri Pacific Railway Company, and the National Trust Company of New York, greeting:

You are, each and every one of you, hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington, District of Columbia, on the second Monday of October, A. D. 1877, pursuant to an appeal filed by the Pacific Railroad, in the office of the clerk of the circuit court of the United States for the eastern district of Missouri, wherein you are complainants and defendants and parties in interest, and wherein the Pacific Railroad is also a defendant, and there show cause, if any there be, why the orders and decrees in said appeal mentioned should not be corrected, and speedy justice should not be done the parties to said cause.

(Signed by) SAM. F. MILLER,
Associate Justice Supreme Court of the United States.

FEBRUARY 1ST, 1877.

126 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

John M. Glover, of lawful age, being duly sworn, on his oath states that he served the within citation upon the within named James Baker by delivering to him a true copy of the same, in the city of St. Louis, within said district, on the fourth day of April, 1877.

JOHN M. GLOVER.

Sworn to & subscribed before me, a notary public within & for the county of St. Louis & State of Missouri.

[SEAL.] FRANKLIN FERRISS,
Notary Public, St. Louis County, Mo.

127 *Copy of citation.*

United States of America to George E. Ketchum, Cornelius K. Garrison, James Seligman, Thomas W. Pierce, The Atlantic and Pacific Railroad Company, Henry F. Vail and James D. Fish, trustees, James Baker, The Missouri Pacific Railway Company, and The National Trust Company of New York, greeting:

You are, each and every one of you, hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington, District of Columbia, on the second Monday

of October, A. D. 1877, pursuant to an appeal filed by the Pacific Railroad, in the office of the clerk of the circuit court of the United States for the eastern district of Missouri, wherein you are complainants and defendants and parties in interest, and wherein the Pacific Railroad is also a defendant, and there show cause, if any there be, why the orders and decrees in said appeal mentioned should not be corrected, and speedy ustice should not be done the parties to said cause.

(Signed by) SAM. F. MILLER,
Associate Justice Supreme Court of the United States.

FEBRUARY 1ST, 1877.

128 ST. LOUIS, *Sept.* 29, 1877.

Service of a copy acknowledged this 29th day of September, 1877 A. D.

J. N. LITTON,
Att'y for the Atlantic & Pacific Railroad Co.

129 *Copy of citation.*

United States of America to George E. Ketchum, Cornelius K. Garrison, James Seligman, Thomas W. Pierce, The Atlantic and Pacific Railroad Company, Henry F. Vail and James D. Fish, trustees, James Baker, The Missouri Pacific Railway Company, and the National Trust Company of New York, greeting:

You are, each and every one of you, hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington, District of Columbia, on the second Monday of October, A. D. 1877, pursuant to an appeal filed by the Pacific Railroad, in the office of the clerk of the circuit court of the United States for the eastern district of Missouri, wherein you are complainants and defendants and parties in interest, and wherein the Pacific Railroad is also a defendant, and there show cause, if any there be, why the orders and decrees in said appeal mentioned should not be corrected, and speedy justice should not be done the parties to said cause.

(Signed by) SAM. F. MILLER,
Associate Justice Supreme Court of the United States.

FEBRUARY 1ST, 1877.

130 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

John M. Glover, being duly sworn, on his oath states that he, on the 23d day of March, 1877, served the within citation on the Missouri Pacific Railway Company by leaving with Oliver Garrison, the vice-president thereof, a copy of the within citation, and *with* leaving at the business office of said Missouri Pacific Railway Company a copy of said citation, with said Oliver Garrison, the person having the charge thereof, Cornelius K. Garrison, the president of said company, not being found in the district, nor residing therein; and I further state that on the 16th day of February, 1877, I served said citation on James O. Broadhead, the solicitor of said George E. Ketchum, the complainant in said suit, by leaving with him a copy of said citation, all in said district.

JOHN M. GLOVER.

Sworn to & subscribed before me this 23d day of March, 1877. (Qualified Nov. 12, 1874; term expires Nov. 10, 1878.)

[SEAL.] FRANKLIN FERRISS,
Notary Public, St. Louis County, Missouri.

131 *Copy of citation.*

United States of America to George E. Ketchum, Cornelius K. Garrison, James Seligman, Thomas W. Pierce, The Atlantic and Pacific Railroad Company, Henry F. Vail and James D. Fish, trustees, James Baker, The Missouri Pacific Railway Company, and The National Trust Company of New York, greeting:

You are, each and every one of you, hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington, District of Columbia, on the second Monday of October, A. D. 1877, pursuant to an appeal filed by the Pacific Railroad, in the office of the clerk of the circuit court of the United States for the eastern district of Missouri, wherein you are complainants and defendants and parties in interest, and wherein the Pacific Railroad is also a defendant, and there show cause, if any there be, why the orders and decrees in said appeal mentioned should not be corrected, and speedy justice should not be done the parties to said cause.

(Signed by) SAM. F. MILLER,
Associate Justice Supreme Court of the United States.

FEBRUARY 1ST, 1877.

132 I acknowledge due service of the within citation.
St. Louis, June 15th, 1877.

GEO. E. KETCHUM,
By JAS. O. BROADHEAD,
Sol'r.

133 UNITED STATES OF AMERICA,
Eastern District of Missouri, sct.:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify that the above and foregoing is a true and complete transcript of the bill of complaint, subpœna in chancery, marshal's return, and other pleadings and proceedings and record in case No. 703, of George E. Ketchum et al., complainants, against Pacific Railroad et al., defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 28th day of September, A. D. 1877.

[SEAL.] M. M. PRICE, *Clerk.*
By A. P. SELBY, *Deputy.*

(Indorsement on cover:) No. 242. The Pacific Railroad of Missouri, appellant, vs. George E. Ketchum, Cornelius K. Garrison, James Seligman, Thomas W. Pierce, The Atlantic and Pacific Railroad Company, Henry F. Vail and James D. Fish, trustees, James Baker, the Missouri Pacific Railway Company, and The National Trust Company of New York. E. Missouri C. C. U. S. Filed 8th October, 1877.

of October, A. D. 1877, pursuant to an appeal filed by the Pacific Railroad, in the office of the clerk of the circuit court of the United States for the eastern district of Missouri, wherein you are complainants and defendants and parties in interest, and wherein the Pacific Railroad is also a defendant, and there show cause, if any there be, why the orders and decrees in said appeal mentioned should not be corrected, and speedy ustice should not be done the parties to said cause.

(Signed by) SAM. F. MILLER,
Associate Justice Supreme Court of the United States.

FEBRUARY 1ST, 1877.

128 ST. LOUIS, *Sept.* 29, 1877.

Service of a copy acknowledged this 29th day of September, 1877 A. D.

J. N. LITTON,
Att'y for the Atlantic & Pacific Railroad Co.

129 *Copy of citation.*

United States of America to George E. Ketchum, Cornelius K. Garrison, James Seligman, Thomas W. Pierce, The Atlantic and Pacific Railroad Company, Henry F. Vail and James D. Fish, trustees, James Baker, The Missouri Pacific Railway Company, and the National Trust Company of New York, greeting:

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(Signed by) SAM. F. MILLER,
Associate Justice Supreme Court of the United States.

FEBRUARY 1ST, 1877.

130 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

John M. Glover, being duly sworn, on his oath states that he, on the 23d day of March, 1877, served the within citation on the Missouri Pacific Railway Company by leaving with Oliver Garrison, the vice-president thereof, a copy of the within citation, and *with* leaving at the business office of said Missouri Pacific Railway Company a copy of said citation, with said Oliver Garrison, the person having the charge thereof, Cornelius K. Garrison, the president of said company, not being found in the district, nor residing therein; and I further state that on the 16th day of February, 1877, I served said citation on James O. Broadhead, the solicitor of said George E. Ketchum, the complainant in said suit, by leaving with him a copy of said citation, all in said district.

JOHN M. GLOVER.

Sworn to & subscribed before me this 23d day of March, 1877. (Qualified Nov. 12, 1874; term expires Nov. 10, 1878.)

[SEAL.] FRANKLIN FERRISS,
Notary Public, St. Louis County, Missouri.

131 *Copy of citation.*

United States of America to George E. Ketchum, Cornelius K. Garrison, James Seligman, Thomas W. Pierce, The Atlantic and Pacific Railroad Company, Henry F. Vail and James D. Fish, trustees, James Baker, The Missouri Pacific Railway Company, and The National Trust Company of New York, greeting:

You are, each and every one of you, hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington, District of Columbia, on the second Monday of October, A. D. 1877, pursuant to an appeal filed by the Pacific Railroad, in the office of the clerk of the circuit court of the United States for the eastern district of Missouri, wherein you are complainants and defendants and parties in interest, and wherein the Pacific Railroad is also a defendant, and there show cause, if any there be, why the orders and decrees in said appeal mentioned should not be corrected, and speedy justice should not be done the parties to said cause.

(Signed by) SAM. F. MILLER,
Associate Justice Supreme Court of the United States.

FEBRUARY 1ST, 1877.

132 I acknowledge due service of the within citation.
St. Louis, June 15th, 1877.

GEO. E. KETCHUM,
By JAS. O. BROADHEAD,
Sol'r.

133 UNITED STATES OF AMERICA,
Eastern District of Missouri, set.:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify that the above and foregoing is a true and complete transcript of the bill of complaint, subpœna in chancery, marshal's return, and other pleadings and proceedings and record in case No. 703, of George E. Ketchum et al., complainants, against Pacific Railroad et al., defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 28th day of September, A. D. 1877.

[SEAL.]

M. M. PRICE, *Clerk.*
By A. P. SELBY, *Deputy.*

(Indorsement on cover:) No. 242. The Pacific Railroad of Missouri, appellant, vs. George E. Ketchum, Cornelius K. Garrison, James Seligman, Thomas W. Pierce, The Atlantic and Pacific Railroad Company, Henry F. Vail and James D. Fish, trustees, James Baker, the Missouri Pacific Railway Company, and The National Trust Company of New York. E. Missouri C. C. U. S. Filed 8th October, 1877.

Supreme Court of the United States.

OCTOBER TERM, 1879.

THE PACIFIC RAILROAD, APPELLANT,
vs.
GEO. E. KETCHUM ET AL., APPELLEES. } No. 242.

REPLY OF APPELLANT TO BRIEF OF COUNSEL FOR APPELLEES.

I.

The right to an appeal is a statutory right; it is not limited in its application to decrees or judgments entered without consent of parties. It is mandatory upon this court to hear and determine all appeals properly taken; whether the judgment below was by consent or otherwise, is immaterial.

Section 692 of the Revised Statutes of the United States says:

"*An appeal* SHALL BE *allowed from all final decrees of any circuit court. The Supreme Court is required to receive, hear and determine such appeals.*

This is not a common law court, but is a court *required* to take jurisdiction and to hear and determine in *all* appeals properly taken from the circuit court to the Supreme Court.

The right of appeal is a statutory right, and does not exist except where expressly given.

It is expressly given in the United States courts.
Section 692 Revised Statutes United States.
36 Maryland, page 604, *Barth vs. Rosinfield.*
9th Ohio, 189, *Brower vs. State of Conn.*

II.

Not one of all the cases decided by the English courts regarding consent decrees presents the question presented in this case, viz:

"*What is the effect of the consent of an attorney where it is given outside of the legitimate scope of the suit begun or different or beyond the facts averred in the complaint?*"

In every case quoted by appellee, the consent given was for such relief as was asked for by the complaint sustained by the facts and germain to the issues made by the pleading, and no other.

III.

A consent decree is like the submission to arbitration; *to be valid it must be within the submission.*

19 Louisiana Annual, p. 433, *Sproul vs. Stewart.*
18 Howard, p. 246, *Puilsord vs. Myers.*
17 Howard, p. 344, *Burchell vs. March.*
1 Wash. C. Ct., 56, *Hurst vs. Hurts.*
5 Wheat., 394, *Lysle vs. Rodgers.*
33 Maine, 219.
35 Maine, 546.

IV.

By the English practice appeals are allowed from consent decrees in the following cases, to which we ask the court to refer:

1 Vernon, p. 273, *Smith vs. Turner;* this was in 1684.
1 Cases in Chancery, 86, *Colwell vs. Childs.*

In this case it was declared *that it should not lie upon the plaintiff to show dissent; for it appears in the decree that it was the solicitor's assent, and if the decree want a sufficient foundation it is error, and the plaintiff shall not be put to show a negative.*

In 1652 it was held, in *Brook vs. Dickens*, which is quoted in *Colwell vs. Childs*, "*that the assent of the solicitor was given in court, and the court knew such assent would not bind the party, and it was folly of the other party to proceed on that assent.*

Also in the following cases:

1 Vesey, Sr., 133, *Butterfield vs. Butterfield.*
1 Merivale, p. 35, *Wood vs. Griffith.*
3 Peere Williams, 242, *Burch vs. Fawcett.*
3 Dow, 61, 66 and 75, *Odell vs. Crane.*
6 Barn. & Cres., 264, *Bedell vs. Dowse.*
7 Irish Eg., p. 221, *Brougam vs. Gorgis.*
47 L. T. Ch. Div., 473, *Attorney General vs. Tomline.*
24 Law T., p. 570, *Stannard vs. Harrison.*

V.

Appeals from consent decrees are held to be well taken in the State courts.

32 Ark , p. 74, *Saliski vs. Boyd.*
9 Ohio, 189, *Brower vs. State of Conn.*
19 Louisiana A., 433, *Sproul vs. Stewart.*

The supreme court of Louisiana reversed a consent decree on appeal on the ground that the relief given by the decree was not that which the parties had agreed should be given.

VI.

"Anything appearing upon the record which would have been fatal upon a motion in arrest of judgment is equally

fatal upon writ of error," although the question is not raised below.

Slacum vs. Pomery, 6 Cranch, 221.
Capron vs. Van Norden, 2 Cranch, 126.
Rogers vs. Burlington, 3 Wall, 654.

N. A. COWDREY,
Solicitor for the Pacific Railroad.

M. W. TYLER,
MATT. H. CARPENTER,
Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1879.—No. 242.

PACIFIC RAILROAD, (OF MISSOURI,) APPELLANT,

vs.

GEORGE E. KETCHUM, C. K. GARRISON, THE MISSOURI PACIFIC RAILROAD COMPANY, ET AL., APPELLEES.

BRIEF OF N. A. COWDREY,
Solicitors for Pacific Railroad of Missouri.

Ketchum, claiming to be a holder of third mortgage bonds made by the Pacific railroad, June 10th, 1875, on which it was claimed default was made in the payment of six months' interest, due November 1, 1875, commenced a suit November 11, 1875, on a complaint sworn to November 3, 1875, to foreclose said mortgage, in the Circuit Court of the United States for the Eastern district of Missouri.

The original parties to the suit were Ketchum, the complainant, who was described as a citizen of the State of New York, against the Pacific Railroad of Missouri.

James Baker, Rufus J. Lackland, and Dwight Durkee, trustees of certain other mortgages, and averred in the complaint to be citizens of the State of Missouri.

Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett, and Luther C. Clark, trustees of certain mortgages, and averred to be citizens of the State of New York. James

Punnett died May 28, 1870, more than five years before the suit was commenced. Luther C. Clark died April 23, 1876, which was long before the decree was made or confirmed. Clark's name was signed to an answer by James Baker, his counsel, January 15, 1877, which was nine months after his death. Record, in No. 162, p. 46.

The said Vail and Fish, averred to be citizens of the State of New York, were trustes of the mortgage, which suit was brought to foreclose, and were citizens of the same State with Ketchum, the complainant.

The Pacific railroad appeared on February 7, 1876, and filed an answer by James Baker, attorney for said company. (Record, p. 15.)

On the 16th day of February, 1876, C. K. Garrison and James Seligman, citizen of the State of New York, and Thomas W. Pierce, a citizen of the State of Massachusetts, petitioned to be made parties complainant. (Record, p. 17.) On the 3d day of April, 1876, said Garrison, Seligman and Pierce, by order of the court, were made parties complainant, Record, p. 19 and 24, without any affidavit or other proof that either of them owned a bond, (as a matter of fact one of them, T. W. Pierce, did not own a single bond, or have any interest in the controversy.)

On the same day, 3d of April, 1876, on motion of James Baker, counsel for the Pacific railroad, others joining in said motion, receivers were appointed by the court.

On June 5, the Atlantic & Pacific railroad, Baker, Murdock, Clark, Morgan, Seligman, Lackland, and Durkee filed their answers. (Clark had been dead for more than a month.) On the next day, June 6, 1876, at an adjourned term of said court, Record, p. 41, a decree of foreclosure and sale was entered by consent of various parties; among others, by the consent of Luther Clark, (who had been dead for near two months,) and by consent of James Baker, solicitor for the Pacific railroad. [Record, p. 41.)

This decree was entered without proofs, hearing, or reference to any master. The decree *falsely* recited it to be on "proofs."

Record, p. 41. There never were any proofs; and none are shown in the Record.

Said decree was extraordinary in its terms; and the Pacific railroad claims that it was fraudulent and not authorized by the mortgage.

The relief granted went far beyond the allegations of the complaint, or its prayer.

The Court found, that of the $4,000,000 of bonds authorized to be secured by the mortgage, (Record, p. 43-44,) that there were then issued only $1,807,000, on which interest was then due; that the remainder of the authorized $4,000,000, viz: $2,193,000, was held by Trustees Vail and Fish to be exchanged for a like amount of income and improvement bonds. The court also found that by the terms of said mortgage the said trustees, Vail and Fish, are *not authorized to sell* the property secured by said mortgage until six months after demand made for the payment of said interest; therefore the court orders (Record, p. 44,) that the Pacific railroad do stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to said mortgaged premises, and that the premises be sold, &c. *No day for payment of the debt was fixed, nor was the amount of the debt due, found or ascertained by the court.*

Any person holding said income and improvement bonds, was authoized at any time before the sale to exchange their bonds for third mortgage bonds, (Record, p. 45-46,) thus increasing the mortgage debt.

The decree directed that nothing in the decree contained shall be construed to prejudice the county of St. Louis, &c. (Record, p. 46.)

Sale was made undor said decree September 6, 1876. The premises were bought by James Baker, attorney, (p. 15,) counsel, (p. 28.) solicitor, (p. 44,) of the Pacific railroad; Baker was also one of its directors. He paid a small sum of money and gave the bond of James Baker, C. K. Garrison, one of the complainants, *et al.*, for $550,000. (Pp. 56, 57.) He paid for the road almost wholly with bonds, on which

suit was brought, and against which he appeared as attorney, counsel and solicitor to defend. (Record, p. 61.) The sale was confirmed by the court October 6 and 24, 1876. (Record, pp. 47-63.)

The master filed his report of the sale September 15, 1876. Motion was made to confirm it September 18.

On September 19 and 22, 1876, a committee of the stockholders representing more than one-half of the capital stock, ($7,200,000,) filed a petition objecting to the validity of the decree, to the sale, and to the purchase made by Baker, their own solicitor, charging fraud, &c., and asking for liberty to plead, answer, or demur to complaint. (Record, p. 47.)

The Circuit Court refused all relief to the petitioners.

The petitioners applied to this court for a writ of mandamus, which was refused. (4 Otto, p. 14; Cutting, *ex parte*.)

The Circuit Court refused to allow the stockholders an appeal or any other relief.

The legislature of Missouri in 1872, it is believed at the suggestion, and upon the procurement of the directors, of the Pacific railroad, authorized the directors of railroads to divide its board into three classes—each class holding office for three years—under this law no matter how flagrant might be the sins of *omission* or *commission* on the part of directors, the stockholders could not change a majority of the board in less than two years; if the stockholders applied to the courts, and the courts removed a director for misfeasance in office or other cause, a majority of the remaining directors filled the vacancy.

The directors of the Pacific railroad were placed in office by the Atlantic and Pacific Railroad Company lessees; the directors had little or no interest in the property and were simply tools of their masters.

The stockholders exerted themselves in every known way to defend the suit. The decree was entered under date of June 6, 1875—really about June 18; it was entered on the last day of an adjourned term, and dated back to the 6th;

after entering this decree the court immediately adjourned. The stockholders at the earliest moment they could do so, the first of the next term, September 19, 1876, filed their motion for liberty to intervene, Record p. 47, and an amended petition for the same purpose, September 22, 1876. The directors refused all aid to the stockholders. See their proceedings set forth in motion to dismiss, p. 46–50. The directors referred the stockholders to the bogus intervention of Akers, which had been withdrawn five months previous, viz: June 6, 1876, Record p. 40.

Akers' intervention was believed by the stockholders to be an intervention in the interest of the directors and the other conspirators; it was fraudulent and was not founded upon any interest in the property. Motion to dismiss, p. 44.

The Circuit Court denied the motion of the stockholders for liberty to intervene, Record p. 54.

The stockholders then sought the protection of this court, and endeavored to obtain the mandate of this court commanding the Circuit Court to allow the stockholders to intervene and defend. The mandate of this court was denied. 94 U. S. Supreme Court, p. 14. *Cutting Ex Parte.*

All relief was refused on the application of the stockholders.

The charter of the Pacific railroad, acts of 1857. State of Missouri, p. 268. "An Act to amend the act entitled 'An Act to incorporate the Pacific railroad,' Section 2, provides 'At every annual meeting, the said *stockholders* shall have power to make, alter or repeal by a majority of the votes given any or all such by-laws, rules, orders and regulations as aforesaid, and do and perform *every other corporate act* authorized by their charter.'"

The stockholders held on adjourned annual meeting December 14, 1876, and authorized and directed an appeal to be taken, Record p. 65. This action was re-affirmed by the stockholders at the next regular annual meeting held in March, 1877, and by the board of directors the same or the next day. The stockholders had by that time been able to

change a majority of the directors, and had unanimously elected those who were willing to defend and prosecute an appeal to protect the right of the stockholders.

Subsequently, viz: February 6, 1877, an associate justice of this court, on petition, allowed the stockholders to take an appeal in the name of the corporation. (Record, p. 64.)

ASSIGNMENT OF ERRORS.

The appellants assign as errors:

1st. The Circuit Court had no jurisdiction, because the controversy was between the citizens of the same State.

2d. The decree was unauthorized and therefore void. Neither the attorney of defendant, railroad company, or its directors had authority to consent to a decree for principal and interest—where the complaint itself only demand relief for the non-payment of interest—and averred that the prinpal was not due.

3. The unauthorized decree is a void decree.

4th. The decree is erroneous because it is a fraudulent decree. There is no proof to support the recitals in the decree.

5th. The decree is erroneous because—

(*a*) It allows no day to the debtor for redemption.

(*b*) It finds no particular sum to be due—or if it finds any it finds the principal and interest to be due, which is contrary to the averment of the complaint and all the proof in the case. There is no complaint, answer, or proof showing more than six months' interest on $2,800,000 to be due, viz: $156,000.

(*c*) Because it was not entered according to the rule of this court, particularly rules 66 and 68. No replication to the answers were filed, or asked for. No time elapsed between the filing of the answers, and the entry of the decree—it was on the same day.

(*d*) Because at the time of the commencement of the suit,

November 3, 1875, the coupons were not due; three days grace, to which all mercantile negotiatble paper is entitled had not elapsed. The coupons were due November 4.

(*e*) Because one bondholder could not commence a suit without showing neglect or malfeasance on the part of the trustee. The trust deed was to trustee representing all bondholders. This was the agreement of the parties, which bound each holder of bonds under the trust.

(*f*) Because the relief granted is far beyond and different from the relief sought in bill of complaint, and not responsive or germain to complaint.

6th. The order confirming the sale of railroad is erroneous because it was not competent for the solicitor of the defendant to purchase the property of his client sold under a decree entered by his procurement and consent, for the benefit of others than his clients. He could not purchase adverse to the interest he was employed to defend.

7th. The decree is erroneous because of its many defects apparent upon its face, of which the defendant will avail themselves upon the argument.

ARGUMENT.

I.

We say that the decree is void for the reason—

1. *That the Circuit Court of the United States had no jurisdiction, because of the citizenship of the parties.*

The Bill of Complaint shows that the complainant, Ketchum, was a citizen of the State of New York. That Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdoch, James Punnett, and Luther C. Clark, defendants, were all citizens of the State of New York. The Pacific Railroad Company and certain other citizens of the State of Missouri were also defendants.

The Bill of Complaint prays, Record, p. 11—

1st. For a foreclosure and sale under a mortgage made to Fish and Vail by the Pacific railroad, July 10, 1875.

2d. That certain real estate may be sold separately, subject to certain other mortgages made to Murdock, Clark and Punnett, and to Morgan and Joseph Seligman; also that certain other real estate may be sold separately, subject to the mortgages made to Lackland and Durkee; also that certain other property may be sold separately and subject to a certain mortgage made to Jesse Seligman and James Baker, or that the entire property may be all sold together subject to said mortgages.

3d. That the net proceeds of the sale of the mortgaged premises under the mortgage dated July 10, 1875, to foreclose which that suit was brought, may be applied to the payment of *all bonds secured by said mortgage last mentioned, at that time outstanding and unpaid, and of the interest thereon, without discrimination or preference, and ratably.*

4th. That defendants be foreclosed.

5th. *That an account may be taken of the bonds secured by said mortgages, and of the amount due on said bonds for principal or interest, or either.*

6th. That a receiver be appointed.

7th. For other relief.

8th. That process may issue with liberty to bring in new resident defendants whenever they come into the State.

(*a.*) From the prayer of the bill, it will be seen that the first controversy is between Ketchum, the *cestui que trust*, and Fish and Vail, his trustees—mortgage made July 10th, 1875, to Fish and Vail. Fish and Vail were made defendants by their *cestui que trust*, Ketchum; and the complainant avers that application had been made to Fish and Vail to take proceedings to foreclose said mortgage, but no proceedings had been taken (only two days had elapsed since non-payment of interest, not the ordinary three days grace allowed on the smallest mercantile note,) *and the complainant was informed and believed* that some doubt had been expressed

(by whom is not averred) whether under said mortgage Fish and Vail had the right to institute foreclosure proceedings by reason of the non-payment of interest (for two days.) The court finds that Fish and Vail had no right to sell the property. Record, p. 44. The allegation in the bill was that Fish and Vail had no right to foreclose. Record, p. 10. Fish and Vail file their answer, and admit that the allegations of the complaint are true. Record, p. 40.

The trustees, Fish and Vail, were essential parties; the suit could not be carried on without them; so this court have often held—

11 Wal., 172, Coal Co. vs. Blatchford.
20 Wal., 123, Knapp vs. Railroad.
21 Wal., 36, Gardner vs. Bowen.
91 U. S., 716–724, Nichols vs. Eaton.

(*b*) From the above it is seen that a direct controversy is raised between the trustees and the *cestui que trust;* between Ketchum and Fish and Vail. No controversy is raised by the answer of the Pacific Railroad. Record, p. 15.

Were the trustees faithful? Had they a right to commence foreclosure proceedings on a default of two days?

The trustees were required to wait until a default in payment of interest had existed for six months.

Could one of the *cestui que trust* commence foreclosure on two days default, or if the coupons were entitled to grace, on no default at all?

The complainant avers, Record, p. 7, that "the mortage contained a clause to the effect that if the said Pacific Railroad should fail to pay the interest on any of said bonds for six months after the same became due and payable, and *demand made* therefor such trustees were authorized and required on the written requests of holders of bonds to the amount of *five hundred thousand dollars*, to sell the road, &c.

A court of equity should give six months grace on these large mortgages. This court gave nine months on about $300,000.

9th Otto. Jackson vs. Ludeling.

It gave one year in which to pay an instalment of interest.

2 Wal., 312. Bronson vs. Souter.

The Pacific road, appellant in this case, was earning $3,600,000 per annum, which is much more than enough to pay operating expenses and interest on all debts. (It is claimed that this road is operated at less than fifty per cent. If at fifty per cent., it would give $1,800,000 with which to pay interest.) The total interest charges on this road was $1,105,370, which left $694,630 per annum for the stockholders. (Record, p. 48.)

Fifty-one per cent of the stock of the road has recently been sold, subject to all the mortgages and to this litigation, at $3,000,000, which is at the rate of $6,000,000 for the equity of redemption that remained for the stockholders after paying all the debts. This large sum, $6,000,000 in value, was underlying the liens of Ketchum, Fish, and Vail, until Garrison and his associates, by gross fraud upon the Circuit Court, caused that court to seize and sell for a nominal sum this great property.

The parties to the deed of trust provided that at least $500,000 of bondholders should ask for a foreclosure. The decree, without any proof on the subject whatever, finds that the complainants had $10,000 of the bonds. Record, p. 27. (It is not believed he had a single dollar; it is known, and can be proved, that some of the others named as complainants, and as being owners of large amounts of bonds, did not have or own a single dollar of them.)

(*d.*) It is true there would have been a controversy between the Fish and Vail as trustees and the Pacific railroad had that company had any other knowledge of what was being done in its name—than such as James Baker, its attorney had—but as it was the answer put in by Baker in name of Pacific railroad made no issue—made no controversy—it practically confessed judgment. There was no

issue made by the pleading or controversy between the Pacific railroad and Fish and Vale, or their *certui qué trust*, Ketchum, Garrison, Seligman, and Pierce. (Record, p. 13–15.

9th. The fourth controversy made by the complaint is that an account may be taken of the amount due under the several mortgages. The validity of some of the bonds were doubtful in part, and others in whole. All the bonds had not been issued, but some were hypothecated by Pacific railroad's lessees—the Atlantic and Pacific Railroad Company. The debt due under the various mortgages was regarded by the complainant as uncertain, but was all confessed by the solicitor of the defendant, the Pacific railroad, in the answer. (Some of said mortgage debts have, since this sale, been compromised at 50 per cent, viz., the Carondelet Branch bonds, of which Jesse Seligman, a citizen of New York, was one of the trustees.)

Jesse Seligman, Joseph Seligman, E. D. Morgan, Uriel A. Murdock, James Punnett, in his life time, and Luther Clark, in his life time, were all and each of them trustees of some of the mortgages given to secure the debt which the complainant prayed to have audited, that an account might be stated and the amount found due, and were all and each of them citizens of the same state with the complainant.

Here a distinct controversey was made by the complainant with citizens of the same State with himself.

Another small defense, but one that the railroad company had a right to make in a case like this, where it is sought to foreclose a mortgage for two days' default of interest, which the Pacific railroad was given no opportunity to make, is that James Punnett had died more than five years before the complaint was filed, and Luther C. Clark died two months before decree was entered. Baker was their attorney, and signing their name to the answer, notwithstanding there were no such men in this world. Record, p. 15, 22, 52.

The debtor did not owe dead men; no account could be stated between the living railroad company and the dead trustees.

II.

If it is asked what is the remedy for this class of cases, with due deference I will suggest it. A court of equity can admit parties to controversies pending in it, to be plaintiffs or defendants, at its discretion.

Meyer Construction Co. vs. U. S. Supreme Court, October Term, 1879.

The Circuit Court should have said to the various trustees citizens of New York, when they offered to file answers as defendants, "take your proper place as plaintiffs in this suit."

The above is exactly what was done by the same circuit judge in the recent case before this court. Sage *et al.* vs. Central Railroad of Iowa, and that about the same month in 1875.

There the same questions as arise here would have arisen, had not the judge ordered the Farmers' Loan and Trust Company to become complainant in place of Alexder, who had commenced the suit just as Ketchum has in this case.

99 U. S., 334, Sage vs. Railroad.

Why should not Fish and Vail have come in as plaintiffs?

We believe that most equity lawyers would have so moved the court.

Ketchum chose to employ counsel who evidently were not familiar with the practice in equity cases in the Federal courts.

The bill of complaint was prepared in New York, and printed in that city before there was any default in payment of interest.

The remedy is obvious. Let parties get competent counsel, who will ask the court for proper orders as to what position in the controversy parties shall take—plaintiffs or defendants—and thus save the court the annoyance of doing for the pleader what he should do for himself.

This controversy is different from that of Meyer vs. Construction Company. In this case—

"The matter in dispute was not ascertained. The parties to the suit were not arranged on opposite sides of that dispute." It did not and does not now appear that those on one side of the dispute are all citizens of different States from those upon the other side of the dispute. This court has so decided.

Meyer vs. Construction Company, October Term, United States Supreme Court, 1879.

III.

The attention of the court has been so recently called to this subject of jurisdiction between citizens of the same State, that I forbear to repeat the authorities cited on that subject when the question was argued before you, but respectfully refer to the brief of my associate, where all the authorities are all referred to.

IV.

Baker as attorney had no authority to consent to this judgment against his client.

James Baker was attorney, Record, p. 17; counsel, Record, p. 28; and solicitor, Record, p. 41, of the Pacific railroad. He bought the mortgaged premises at the master's sale, and received a deed therefor. Record, p. 57. This was adverse to and against the interest of his clients, the Pacific railroad. Record, p. 66. The Record in Cutting *ex partes*, 4th Otto, 14, which is on file in this court, shows that Baker brought the mortgaged premises for the Missouri Pacific Railroad Company, one of the appellees in this case. The order confirming the sale so finds. Baker's affidavits attached to sale to motion to dismiss shows the same fact, and in which, if the proceedings are sustained, his client, the railroad, appellants, have no interest, part or lot.

Baker was employed to defend a suit where six months' interest was claimed to be due on about $2,800,000; viz., $88,000. Record, p. 7. Instead of defending it, he consented to a decree, p. 44, finding the principal and interest to be due.

The principal of the bonds was not due until July 10, 1895, the complaint so averred; (*a*) the interest was due semi-annually, but the complaint avers that not more than $2,800,000 of the bonds were issued; the remainder were in the hands of Fish and Vail, to be exchanged for income and improvement bonds. But three months and twenty days could have elapsed from July 10 to November 1 in the same year. The complaint on its face showed all this.

If an attorney has a legal right to consent to a judgment at all, he can have no right to consent to a judgment for a larger sum than the complainant avers to be due; (*a*) until the whole debt becomes *due*, the court will not grant a *conclusive decree*. Jones on Mortgages, section 1557, and authorities there cited. Otherwise counsel can, as they did in this case, ruin their clients, without the knowledge of the clients.

The directors could not give the attorney authority to consent to such a decree—they had not the authority to give—they were only authorized to manage the property of the corporation, and not to consent to a judicial sale of it on a pretended debt, one which did not exist.

See Rover on judicial sales, title, "Who may Buy," p. 47, where a large number of cases on this subject are collated.

A director may not buy without leave of the court. Jas. Baker, the attorney, was also a director of the Pacific railroad. (See Rover, p. 47.)

In Missouri, the State where the property is situated, there is a long list of decisions on the subject, the substance of which are:

That a director of a corporation cannot buy the property of the corporation at a judicial sale without leave of the court.

29th Mo., Rept., 191. Jamison vs. Glovock.
43d Mo., Rept., 153. Thornton vs. Irwin.
44th Mo., Rept., 444. Grumley vs. Webb.
45th Mo., Rept., 552. Hull vs. Voorhees.

V.

A party cannot have greater relief than he asks for in his petition.

5th Iowa, p. 503. Havens vs. Baldwin.
10th Iowa, 23. Stadler vs. Parmlee.

The Iowa cases were, where the party sued for the principal sum named in the note, and interest, and got judgment for principal and *interest*, from maturity of note, judgment held to be erroneous.

A decree must correspond with pleadings and proofs.

3 Wall, 704. Minnesota vs. Chamberlin.
7 Wheat, 522. Crockett vs. Lee.
10 Wheat, 181. Corneal vs. Banks.
34 New Jersey L. Rept., 418. Mundy vs. Vail.

Averments without proof and proof without averments are alike unavailing; the decree must conform to the scope and object of the prayer, and cannot go beyond them.

10 Wall, 363. Railroad vs. Bradley.

It has been held that objections not taken in the court below will not be taken in this court. Where there is such a combination of errors, and errors of so grave a character as those which mark the case before us, this principle can have no application.

10 Wall, 303. Railroad vs. Bradley.

Attorney has no right to compromise a case.

21 Conn. Rep., 244. Derwort vs. Loomer.
56 Mo. Rept., 465. Spears vs. Ledberger.
7 Cranch, 436. Holker vs. Parker.

Chief Justice Marshall says the attorney stood by and looked on silently; his silence was construed into consent by the defense. To this court it appears that the judgment of

the arbitrators was a compromise between attorneys, taking the form of an award. The attorney had no right to make such a compromise.

VI.

It follows that if Baker had no authority to consent to such a decree, the court had no authority to enter it.

The decree was entered in violation of all equity, law and practice.

Answers were put in June 5. The next day the decree was taken by consent. (Record, pp. 39–41.)

The rules established by this court requires a replication to be filed, Rule 66—and allow three months after issue joined, before the cause stands for hearing. Rule 68—Had that rule been followed here, Baker's clients would have dismissed him and substituted other counsel, as they afterwards did. (Record, p. 65.)

No replication was ever filed. The bill was liable to be dismissed under the 66th rule established by this court. Baker did not ask for any replication or for the enforcement of this rule.

It is an irregularity to go into a hearing without replication or averment. A replication is necessary to put the cause at issue.

10 Wall, 299, Railroad vs. Bradley.

Harm resulted to the appellant; it was a material departure from the rules of proceeding. This court will give relief under such circumstances.

97 U. S., p. 144. Allis vs. Insurance Co.

This court does not look with favor upon speed in equity cases where the decree is entered contrary to the rules of court.

93 U. S., 153. O'Hara vs. McConnell.

The rule established by this court was for the purpose of protecting the rights of parties, suitors to this court. The evil results of evading or nullifying them are illustrated in this case.

An agreed and collusive hearing is a gross irregularity.

10 Wall, 302. Railroad vs. Bradley.

17 Wall, 417. Moor vs. Huntington.

Daniels' Chancery Pr., 394.

All who take advantage of a breach of trust participate in the wrong, and cannot take any benefit from it, viz.:

1 Wood, 368 and 379. Campbell vs. R. R.

5 Dana, 139. Talbot vs. Todd.

VII.

If this court is satisfied that this decree should be reversed, it will give no judgment in intervening matters.

We have attempted to show:

1st. That the Circuit Court had no jurisdiction, by reason of citizenship of the parties, and, failing in that,

2nd. Because the court could not have jurisdiction to make a consent decree, unauthorized by the parties themselves; that it was not competent for the attorney to give the consent, or for the directors to authorize the attorney to consent.

VIII.

FRAUD.

The decree as entered is a fraud npon the court, and therefore void or voidable.

98 U. S., p. 64-66. U. S. vs. Throckmorton.

Fraud vitiates everything, a judgment as well as a contract.

Wells, *Res. Adjudicaita*, § 499.
Bigelow on Fraud, 170-172.

The manner of obtaining jurisdiction, if fraudulent, may be collaterally shown.

Bigelow, 171, 31 Iowa, 260. Dunlop vs. Cody.

The indexes of fraud upon the record are:

1st. The mortgage was made July 16, 1875; the bonds purporting to be secured thereby were dated back to May 1, 1875, and made to carry interest from May 1, so that the first coupon would be due November 1.

2nd. The Pacific Railroad was not in default upon any claim whatever against it, except it be upon the fraudulent mortgage sought to be foreclosed. To that time it had paid its interest regularly, and also regular dividends upon its stock. The complaint does not aver any default against the Pacific railroad, except the untruthful one that its commercial paper had been protested, and that the coupons on the fraudulent mortgage maturing November 1, 1875, were due and unpaid.

3d. The only complainant at the commencement of the suit was George E. Ketchum. He was not sufficiently informed as to what interest he had in the matter, or whether he owned any particular number of bonds, so as to set forth his exact injury, represented by an ownership in the trust property. His averment in the bill of ownership of bonds showing his interest, or want of interest, is that "he is the holder of many of said bonds." (Record, p. 7.) The decree finds, it is believed falsely, and, without any proof whatever on the subject, that the complainant, Ketchum, owned ten bonds. (Record, p. 44.)

4th. The final decree did not require the receivers to account or to apply what money they had on hand, derived from the earnings of the road, to the payment of the debt, or of the interest upon mortgage bonds being foreclosed; had

it done so, these conspirators would have been defeated; there could have been no sale of the railroad, for the court itself had, at the very time, money enough in its hands to pay the interest alleged to be due upen the fraudulent debt, which the court was enforcing against the road. And the principal was not due until 1895.

5th. The directors refused, on the demand of holders of the capital stock, to the amount of 10,000 shares or $1,000,000, to make a motion in the name of the corporation to set aside said decreee, and also refused to allow said stockholders to use the name of the corporation to set aside said decree. (Motion to dismiss, p. 47.)

The directors also refused to authorize other counsel, those standing as high in every respect as any counsel in Missouri, to act for the corporation in resisting this great fraud—the foreclosure and sale of the railroad. See motion to dismiss, p. 16, and that after the stockholders, at an annual meeting, had passed a resolution unanimously requesting the directors previous to the entry of the decree, viz., March 27, 1876, to employ counsel, other than James Baker to protect the corporation. (Record, p. 5.)

9th. The decree was so cunningly worded that none but a holder of these fraudulent bonds could purchase the railroad at the sale. It provides, "that in case said road, &c., shall be purchased by bondholders or for bondholders, then, at any time within sixty days after said sale, any bona fide holder or holders of said third mortgage bonds, secured by the mortgage sued on in this case, shall be allowed to become associated with said original purchaser or purchasers in proportion, &c." (Record, p. 45.)

The direct effect of which was to deter bidders at said sale. If a person interested in a small amount of the bonds got up a party to buy the road, bid at such sale and furnished the

entire amount of the purchase money as required by the decree, the purchaser was required, sixty days after the purchase, to accept Garrison, Sage *et al.* as co-partners with him in the purchase, and they, owning a majority of the bonds, would control the property ; that is to say, if the purchaser owned say $5,000 of said bonds, and bought the property at $4,000,000, the whole amount of the mortgage, then sixty days after he had paid $4,000,000 into court in money, Garrison and Sage *et al.* would come in with their bonds and reduce the ownership of the purchaser from that of the whole road to becoming an owner of one eight-hundredth part of it, he would temporarily have to furnish the $4,000,000 and would come out at the end of sixty days as the owner of one eight-hundredth of it.

There could be no competition at a sale made under such a decree. The practical effect of it is illustrated in this very case. Garrison and Sage, through Baker, bought the road subject to mortgage of $11,791,000 for the sum of $3,000,000. They then mortgaged it for $4,500,000 additional, making a total mortgage of $16,291,000, less $250,000 saved on a compromise of the Carondolet branch road—$16,041,000, and then sold 51 per cent. of it to Gould and Sage, subject to $16,041,000 of mortgages, which was at the rate of $6,000,000 for the equity.

Or in other words assuming their third mortgage bonds to have been worth their full value—more than twice what they gave for them—$4,000,000. The property cost them $15,541,000, and they sold it to a purchaser who was not tramelled in the choice of associates by such a decree as the one appealed from at $21,541,000, a profit—omitting the profit made on the bonds and the large income of the road during the pendency of this appeal from the account—of $6,000,000 on the purchase made from the court.

And this large sum was all taken from these appellants by the proceedings now brought here for the review of this court.

The purchase by a mortgagee through the interposition of

another is a badge of fraud, and the sale voidable at the instance of the mortgagor.

44 Mo. Rept., 153 and 163. Throckmorton vs. Irwin.

7th. Suspicion is thrown upon the 5th and 6th days of June, 1876. The court was an adjourned or special term, held at an unusual time—the local judges were not there—a judge from an adjoining district was called in. Agreeable answers were filed on the 5th by Lackland & Durkee, by the Atlantic and Pacific Railroad; the Pacific Railroad, James Baker, &c., &c., by Clark, who had been dead for more than two months; and on the 6th of June by Fisk & Vail, who should have been complainants.

Oaths to all the agreeable answers were waived by Day & Broadhead.

On the same day Akers and the county of St. Louis withdrew all that was objectionable in their previous cross bills and answers, and thereupon the decree complained of was entered.

Garrison's letter, agreeing to pay the county debt, thus inducing the county to withdraw its cross bill as a stockholder, was dated June 1, 1876. See p. 6 of additional exhibit to reply to motion to dismiss.

A mere recital of what was done on those two days indicates a vast deal of trading among litigants.

All seemed to have been content and benefitted, except the poor stockholders of the Pacific railroad, who were deeply wronged. They were not present, except by their counsel, James Baker, whom they allege to have been unfaithful to his duties and trust. The stock was owned by three hundred to four hundred different persons scattered all over the country, who now at the earliest day they can be heard appear before the court and ask for its judgment upon these transactions.

8th. The decree omits to find the usual and necessary facts upon which it should be based; it does not find the amount of debt due clearly, if at all, but leaves the same unsettled and undetermined. If it finds the principal and interest of the whole amount of bonds to be due, then its findings are contrary to the averments of the complaint which avers that the principal of the bonds is not due until 1895, and that but $2,200,000 bonds had been issued; the balance was held in trust by Vail and Fish.

In Missouri a decree must fix the precise sum due, or it is erroneous.

13 Mo., p. 545. Cohen vs. Carrol.

It is said that this was not a strict foreclosure, and therefore the amount of the debt on the day of payment need not be paid. We are unable to see any distinction in principle between decrees of strict foreclosure and decrees of sale.

9th. The decree limits no time within which the debt is to be paid, but declares said Pacific railroad to be at once then and there absolutely debarred and foreclosed, &c. (Record, p. 44.)

Such a decree cannot be sustained.

8 Wal., 318. Clark vs. Reyburn.

10th. The master, within sixteen days from June 6, the time of entering the decree, viz., June 22, 1876, issued his order and advertised the property for sale.

The order to sell in equity is an execution, and, by the laws of the United States, the defendant was entitled to sixty days time within which it might take a suspensive appeal. The premises could not legally have been advertised for sale until August 7, 1876. They were advertised on June 22, 1876.

11th. The decree omitted to tax cost in favor of the prevailing party; the 983 section of the Revised Statutes of the

United States requires cost, disbursements and allowances to be taxed.

IX.

We will now attempt to show that the decree must be set aside.

1st. Because Baker could not, being the attorney of the Pacific railroad and a director thereof, buy the mortgaged premises adverse to his clients interest, or at all, without instruction from his client.

The duties of the attorney to his client do not cease with the entry of judgment.

5 Peters, 99. Banks vs. Geary.

The fiduciary capacity of the attorney incapacitates him from purchasing his client's property at a judicial sale.

21 Wall, 178, Marsh vs. Whitmore.
21 Wall, 592, Jackson vs. Ludeling.
4 Howard, 503, Michoud vs. Girod.
11 Howard, 247, Stockton vs. Ford.
9 Bush, Ky. Rept., 468, C. & L. R. R. vs. Bowler.
54 N. Y., 314, Hoyle vs. Plat. & Mont. R. R.

Rorer on judical sales, p. 47, title, "Who may buy," has a large collection of authorities on this subject, to which attention is called.

29 Mo. Rept., 191, Jaimson vs. Glavock.
43 Mo. Rept., 153, Thornton vs. Irwin.
44 Mo. Rept., 444, Grumley vs. Webb.
45 Mo. Rept., 555, Hull vs. Voorhees.
56 Mo. Rept., 465, Spear vs. Lederberger.

It is the duty of the attorney not only to be honest, but to so conduct the business which he is charged with before the

court as to avoid the appearance of dishonesty. If the courts encourage the appearance of dishonesty on the part of its attorneys, they lose the respect of the people, with all the sad consequences to the country that follow such a loss of respect on the part of the governed.

"The noblest employment of man is to assist man."
—*Sophocles.*

The law relating to the authority and duty of attorneys is collated in Weeks on Attorneys, p. 382 and 465.

X.

Nothing was due when the suit was commenced. The coupons became due November 1, but by the law merchant three days grace is allowed on negotiable paper, which, if allowed on these coupons, they did not become due until November 4—the day after the suit was commenced.

Jones on Railroad Securities, section 320–326.
66 N. Y. Repts., 14–22; Everton vs. Bank of Newport.
3 Wal., Jr., 381; McCoy vs. Washington County.
9 Wal,, 484; The City vs. ~~Lurner~~ Lamar.

This court say there is but one contract. The bond being payable to bearer the coupons are also.

XI.

The Pacific railroad desired to avoid multiplicity of suits, it therefore made the trust deed to Fish and Vail—who alone could bring suit upon it, unless they were guilty of a breach of trust—none other is averred against them, except that they had been applied to bring suit on a two days' default one day before the obligation was due, and they had not brought it. See Record, p. 10, the court found in the decree that Fish and Vail had no right to bring the suit. (Record, p. 44.)

Fish and Vail owed certain duties to the Pacific railroad,

and were trustees in part for it—one of their obligations and trust was not to attempt the enforcement of the mortgage until the interest became due and was in default for six months.

When trustees are in existence and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act.

91 U. S., p. 716 and 724; Nichols vs. Eaton.
Hill on Trustees, 486 and 489.
Levison on Trust, 238.
1 Hughes, 28; Richards vs. Railroad, Wait, C. J.
16 Wal., 450; Ribon vs. Railroad.

XII.

This suit was a conspiracy to cheat the stockholders of the Pacific railroad out of their property. The original conspirators were its board of directors, or a majority of them—James Baker, who acted as its counsel; C. K. Garrison, the Seligmans, and others interested in the Atlantic and Pacific railroad.

The company did not owe a dollar; no other indebtedness is averred in the complaint, except that on the bonds on which suit was brought.

The commercial paper which it is averred had been protested, (Record, p. 9,) was all of it, where the name of the Pacific railroad had been fraudulent and wrongfully used to sustain the credit of the Atlantic and Pacific Railroad Company. It was in no rightful sense commercial paper, but was fraudulent and unauthorized paper made, for base purposes, by its unfaithful officers and directors; it all as a matter of fact was made and created by the Atlantic and Pacific Railroad Company,

No legal obligation rested upon the Pacific railroad to pay a dollar of such debts.

The Pacific railroad was in receipt of a large income, viz., about $4,000,000 per annum gross, and about $800,000 after paying all charges, including taxes and interest. It had to that time been paying regular quarterly dividends to its stockholders, which caused the stock to be taken by widows, orphans, clergymen, and others, seeking what they were lead to believe to be a safe eight per cent. investment. It became one of the most widely distributed stocks known to the market, and was chiefly dealt in by the above class of persons for investment. Suddenly, without any diminution of its revenues, the conspirators commenced selling the stock and borrowing it for future delivery. The advertised dividend was passed, the stock was very largely depreciated in value, the conspirators were enriched by their short sales, the foreclosure and sale was sprung upon the stockholders, the property, by the aid of the Circuit Court, taken from its owners, and handed over to the conspirators. The public and the investors above-named were swindled out of their property to enrich the purchasers of the premises under a mortgage made and issued for the purpose.

It was the best property and the best line of railroad in Missouri.

It was unforunately leased to the Atlantic and Pacific Railroad Company, which last-named company could not keep the covenants of the lease, whereby the lessee became very largely indebted to the lessor, viz: in about the sum of $7,000,000.

It therefore became for the interest of the debtor lessee to destroy the lessor, and thus avoid troublesome covenants into which it had entered, and a large accumulation of debt under the lease.

The lessee had named and elected the directors of the lessor company, and employed its counsel, nearly all of whom were supple tools to do the bidding of their employer.

By the aid of a Court of Equity, secretly and at an adjourned term, contrary to its established rules, the conspirators succeeded in having this large and immensely valuable

property sold to themselves. And if they can get the sanction of this court they will keep their ill-gotten gains, fifty-one per cent. of which were awarded to C. K. Garrison, whom the appellees claim has sold out. (Motion to dismiss, p. 13.) That Garrison has sold out we admit to be true. It is also true that he sold fifty-one per cent. of his ill-gotten gains to Mr. Jay Gould and Russell Sage, at the sum of $3,000,000. This fifty-one per cent. was a stock which was subject to $4,500,000 more mortgage than the property was sold subject to at the master's sale, or $500,000 more than the former indebtedness.

In all the cases cited by counsel for the appellees, where decree was by consent, there had been a trial of the various issues made in the court below. The parties had appeared and been heard on the matters in controversy.

All the appellants in this case is a chance to try their cause, to be heard before some judicial tribunal. This they never had

Mr. Justice Field, in 18 Wall, p. 368, Galpen vs. Page, says: "It is a rule as old as the law, and never more to be respected than now, that no one should be personally bound until he has had his day in court."

The Pacific railroad was prevented from presenting its case by fraud and deception on the part of Garrison and Baker. It is entitled to have its case fairly presented to the court.

98 U. S., p. 68. United States vs. Throckmorton.

It is said they might have sought relief through Akers. (P. 13 of Motion to dismiss.) The same record (p. 44) shows Akers' intervention to have been collusive, as one gentleman in court, who was no party with Akers, had the identical stock in his pocket on which the Aker intervention was had. (Motion to dismiss, p. 44.)

Akers was a dummy, put forward by the conspirators.

The stockholders had then a petition pending to be made parties. They did not wish to be nailed to Akers.

The stockholders' petition to be made parties was denied. The records of the Circuit Court in another case show that some of the stockholders who spoke to Akers' counsel were sued for $10,000 counsel fees.

An inspection of the records in this case and in other cases in the Circuit Court will show reasons enough why the stockholders could get no relief through the intervention of Akers.

And the directors innocently ask why not go in with Akers? (Motion to dismiss, p. 49.)

The stockholders were dazed for a time; they would not believe that under the forms of law they could lose their property so suddenly. Finally some stockholders, in November and December, 1876, were aroused; they appointed a committee to represent them—to take the place of their unfaithful directors. That committee was appointed December 14, 1876; from that time to the present they have labored diligently in all places to serve the interest of the Pacific railroad and its stockholders.

Some of them as individuals had previously dallied with some of the conspirators, to what extent is shown on the motion to dismiss. (P. 29, Letter of Garrison to certain stockholders.)

A careful reading of that letter will show that the stockholders to whom it was directed, were willing in the hope of saving something and to avoid extended litigation, to compromise with the conspirators by allowing Garrison and other holders of the bonds, which were claimed to be invalid and unsecured by any mortgage, to be made good, *i. e.* their bonds to be made valid through the instrumentality of an undisputed mortgage; and then the whole amount of stock was to be issued again to the stockholders, to the full amount. (See p. 32 of motion to dismiss—Garrison's letter.) But the individual stockholders who listened for the time to his promises were mistaken in their man; the validating of $4,000,000 of doubtful mortgage bonds was not a big enough "steal" for him and his associates.

He broke his agreement.

It is true that the individual stockholders have sued him, in New York, for the breach of this agreement. (Motion to dismiss, p. 21.) The individual stockholders who have commenced the New York suit do not expect but one satisfaction for the injury done to them, and they prefer to try to get it at the hands of this upright and pure court.

Garrison and his associates are very powerful in political circles and with New York courts. The Pacific railroad prefer to get its property back at the hands of this court, to any expectation of redress individual stockholders may obtain against Garrison personally in the New York courts.

The corporation is not bound or estopped by the action of individual stockholders where they have been admitted parties to the suit, although they may have set up the same acts asked for the same relief.

9th Bush, Ky. Rep., 468. C. & L. Railroad vs. Bowler.

The action against Garrison in New York is an individual affair of certain individual stockholders, who claim to have been damaged by his breach of contract with them.

The redress sought for here is by the corporation, the Pacific Railroad, of Missouri. The two matters have no connection. One is certain individuals, the other is a corporation.

Garrison made a false promise of a compromise, which, in the language of this court, is sufficient cause for reversing the decree appealed from.

98 U. S. U. S. vs. Throckmorton, pp. 65-66.

Much more is this the case where the court refused to admit the individual stockholders. We particularly invite the attention of this court to the case of the C. & L. Railroad vs. Bowler, and to the authorities there cited as sustaining the position of counsel and court.

The Pacific Railroad is not dead, as alleged by the appellees, (p. 13 of motion to dismiss,) but alive, and has large claims, which it hopes to enforce against the conspirators to destroy its property. It yet hopes to faithfully serve the public as a carrier of persons and property.

The Pacific railroad is not dead, it has received some terrible wounds from the hands of assassins, some of whom were its own servants, directors and attorney, they plunged their daggers into its vitals up to the hilt, but it survives, and with the just officers of this high tribunal will be rehabilitated in health, property and good standing.

The conspirators say (p. 13 of motion to dismiss,) that the appellants are undertaking to revive a dead corporation.

With all of the wickedness, but none of the honor and boldness of *Macbeth*, they might exclaim:

> "Thou canst not say I did it;
> Never shake thy gory locks at me."

And again, with *Malcolm*—

> "With this, there grows,
> In my most ill-composed affection, such
> A staunchless avarice, that were I king,
> I should cut off the nobles for their lands,
> Desire the jewels of one, and the house of another;
> And my more having would be a sauce
> To make me hunger more; that I should forge
> Quarrels unjust against the good and loyal,
> Destroying them for wealth."

Macduff—

> "This avarice
> Sticks deeper; grows with more pernicious root
> Than summer seeding lust; and it hath been
> The sword of our slain kings."

The Pacific railroad so far from being dead will show if it is allowed allowed to so,

1st. That of said $4,000,000 of bonds not one dollar was ever expended for its benefit, That said mortgage was a swindle and a cheat upon said Pacific railroad.

2d. That the bonds were hypothecated for the debts of the Atlantic and Pacific Railroad Company, and at very small sums, as low as 25 per cent.—and by the creditors of that

company nominally sold to pay said debts—but really practically divided among those favored creditors, such as C. K. Garrison, Russell Sage and Seligman Brothers.

The bonds claimed to be owned by those gentlemen were more than one-half of the whole issue, and cost them less than fifty per cent of their face.

The list of bondholders given under date of August 1, 1876, in supplemental motion to dismiss is a bogus list, and entitled to no consideration.

(*a.*) It does not purport to be a list of bondholders of October 6, 1876, the time of the sale. Large changes in ownership might, and did, take place within that time.

(*b.*) It is a bogus list, got up originally to pretend that Garrison could not keep his agreement shown in the motion to dismiss, and it is now dragged in here to impose upon the court. We confidently aver that the following gentlemen did not have the bonds set opposite their names. There is no affidavit or original signature showing that they ever signed the paper at all or for any such amounts:

D. R. Mangum	$400,000
T. W. Pierce	200,000
Andrew Pierce	175,000
Jas. D. Fish	116,000
Wm. H. Guion	50,000
Oliver Ames	45,000
	$986,000

The decree finds that T. W. Pierce had $50,000 of said bonds, and even that is unturue, he did not have any.

We denounce the list as bogus and untrue, and if there is any importance to be attached to it, ask that we have opportunity to take proofs on the subject.

3d. The Pacific railroad will show that no mortgage was ever authorized by the stockholders to secure the payments of said bonds, as required by the statutes of Missouri, (Wagner's statutes, vol. 1, p. 315 *e*, the assertion of counsel to the contrary notwithstanding. (See p. 49 of motion to dismiss.

4th. That the mortgage, such as it was, was void on the personal property of the Pacific railroad, because it was never recorded as required by the law of Missouri.

5th. That the mortgage was a fraud on the Pacific railroad, imposed upon it by its directors for improper purposes, which purposes were accomplished by the foreclosure and sale of the Pacific railroad—under their action, if not direction.

The appellees aver in their motion to dismiss, (p. 13,) that "the stock of the new company, representing the property acquired at the sale, has passed from the original owners."

The appellants admit that Garrison, one of the original conspirators, has sold fifty-one per cent. of the new stock to Mr. Russell Sage, another of the original conspirators, and to Mr. Jay Gould; but what equity that establishes in their favor is not apparent. Both purchasers are well known dealers in chances. They are understood to be ready at any time to take any chance, where the stakes are large enough. They have never been called in Wall street or its vicinity "lambs." It would excite mirth there to say that Garrison is a wolf, devouring those gentle *lambs*, Sage and Gould.

In no instance within the knowledge of this court has an appeal been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree.

7 Howard, 185. Eruson vs. Lowery.

93 United States, 154. O'Harr vs. McConnell.

Whatever the result is, both Sage and Gould purchased with knowledge. Sage is one of the bondsmen for appellant in No. 162, which is a part of the record in this case. It was all one case in the circuit court; Sage was an original bondholder; was in this conspiracy against the stockholders of the Pacific railroad from its inception. Gould is his associate in this purchase; what one knows the other knows; knowledge of one is knowledge of both.

This court has had these names often before them, and in

a transaction where one of them was a party in trying to magnify the liens upon the property being administered by the court, and to depreciate its value, received the opinion of this court in 1863. It needs "line upon line and precept upon precept" to be administered by this court.

1 Wall, 530. Wheeler vs. Sage.

The stockholders of the Pacific railroad will be slow to believe Sage to have been an innocent purchaser, without notice.

Where the grantee has knowledge that the party of whom they bought was a director of the sold-out company the grantee is put upon inquiry. The grantees in such cases are not innocent purchasers.

9 Bush, Ky. Rep., 468. C. & L. R. R. vs. Bowler.

We have, as well as we know how to do, under the rules of this court, placed before it and submitted to its judgment one of the greatest railway frauds practiced in this country, committed, according to and under the forms of law, upon its stockholders, by its directors and attorneys conspiring with the most noted and unscrupulous men in this line of business in this country.

Were it a small lot or farm, or a single house of trifling value, is there any doubt but that a sale made under the circumstances that this sale was made, would be set aside and for nothing had?

Should there be any doubt because property of the value of $6,000,000 and upwards, and an accounting for a net income of near $2,000,000 per annum since October 24, 1876, is involved?

We do not believe this court will give its sanction to such proceedings of the Circuit Court as are above recited.

This court will remember, in the recent language of the Supreme Court of the State of Maine, that "we, (the stockholders of the Pacific railroad,) are a plain people," not instructed in the technicalities of such men as Garrison, Sage,

Seligman, and others of same tenor and date, and that we need the protection of this court from their grasping avarice.

The law of Missouri requires on reversal of a decree the property sold to be restored. (41 Mo. R., 416.) It has been so decided by this court.

XIII.

This appeal should be remanded to the Circuit Court, with directions to revoke its decrees on its own motion for want of jurisdiction, and to restore the property, taken by its receiver, to its owners, the Pacific railroad, or, if this court thinks the Circuit Court had jurisdiction, but that the decree as entered was a fraud on the Pacific railroad, then with directions to vacate said orders of confirmation and decree, with liberty to the defendant to plead, answer or demur as advised, and the mortgaged property to be returned to the hands of receivers to be appointed by this court, or by the Circuit Court.

N. A. COWDREY,
Solicitor.

M. W. TYLER,
MATT. H. CARPENTER,
Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1879.

THE PACIFIC RAILROAD, APPELLANT,
vs.
GEO. E. KETCHUM ET AL., APPELLEES. } No. 242.

Reply of Appellant to Brief of Counsel for Appellees.

I.

The right to an appeal is a statutory right. It is not limited in its application to decrees or judgments entered without consent of parties. It is mandatory upon this court to hear and determine all appeals properly taken; whether the judgment below was by consent or otherwise, is immaterial.

Section 692 of the Revised Statutes of the United States says:

"*An appeal* SHALL BE *allowed from all final decrees of any Circuit Court. The Supreme Court is required to receive, hear, and determine such appeals.*"

This is not a common law court, but is a court *required* to take jurisdiction, and to hear and determine in *all* appeals properly taken from the Circuit Court to the Supreme Court.

The right of appeal is a statutory right, and does not exist except where expressly given.

It is expressly given in the United States courts.

Section 692, Revised Statutes United States.

36 Maryland, page 604; Barth vs. Rosinfield.
9th Ohio, 189; Brower vs. State of Connecticut.

II.

Not one of all the cases decided by the English courts regarding consent decrees, presents the question presented in this case, viz:

"*What is the effect of the consent of an attorney where it is given outside of the legitimate scope of the suit begun or different or beyond the facts averred in the complaint?*

In every case quoted by appellee, the consent given was for such relief as was asked for by the complaint sustained by the facts and germaine to the issues made by the pleading, and no other.

III.

A consent decree is like the submission to arbitration; *to be valid it must be within the submission.*

19 Louisiana Annual, p. 433, Sproul vs. Stewart.
18 Howard, p. 246, Puilsord vs. Myers.
17 Howard, p. 344, Burchell vs. March.
1 Wash. C. Ct., 56, Hurst vs. Hurts.
5 Wheat., 394, Lysle vs. Rodgers.
33 Maine, 219.
35 Maine, 546.

IV.

By the English practice appeals are allowed from consent decrees in the following cases, to which we ask the court to refer.

1 Vernon, p. 273. Smith vs Turner. This was in 1684.
1 Cases in Chancery, 86. Colwell vs. Childs.

In this case it was declared *that it should not lie upon the*

plaintiff to show dissent, for it appears in the decree that it was the solicitor's assent, and if the decree want a sufficient foundation it is error, and the plaintiff shall not be put to show a negative.

In 1652 it was held, in Brook vs. Dickens, which is quoted in Coldwell vs. Childs, "*that the assent of the solicitor was given in court; and the court knew such assent would not bind the party; and it was folly of the other party to proceed on that assent.*"

Also in the following cases :

1 Vesey, Sr., 133. Butterfield vs. Butterfield.
1 Merivale, p. 35. Wood vs. Griffith.
3 Peere Williams, 242. Burch vs. Fawcett.
3 Dow, 61, 66, and 75. Odell vs. Crane.
6 Barn. & Cres., 264. Bedell vs. Dowse.
7 Irish Eng., p. 221. Brougam vs. Gorgis.
47 L. T. Ch. Div., 473. Attorney General vs. Tomline.
24 Law T., p. 570. Stannard vs. Harrison.

V.

Appeals from consent decrees are held to be well taken in the State courts.

32 Ark., p. 74. Saliski vs. Boyd.
9 Ohio, 189. Brower vs. State of Conn.
19 Louisiana A., 433. Sproul vs. Stewart.

The Supreme Court of Louisiana reversed a consent decree on appeal on the ground that the relief given by the decree was not that which the parties had agreed should be given.

VI.

"Anything appearing upon the record which would have been fatal upon a motion in arrest of judgment is equally fatal upon writ of error," although the question is not raised below.

6 Cranch, 221, Slacum vs. Pomery.
2 Cranch, 126, Capron vs. Van Norden.
3 Wall, 654, Rogers vs. Burlington.

N. A. COWDREY,
Solicitor for the Pacific Railroad.

M. W. TYLER,
MATT. H. CARPENTER,
Counsel.

IN THE

Supreme Court of the United States.

No. 242.

OCTOBER TERM, 1878.

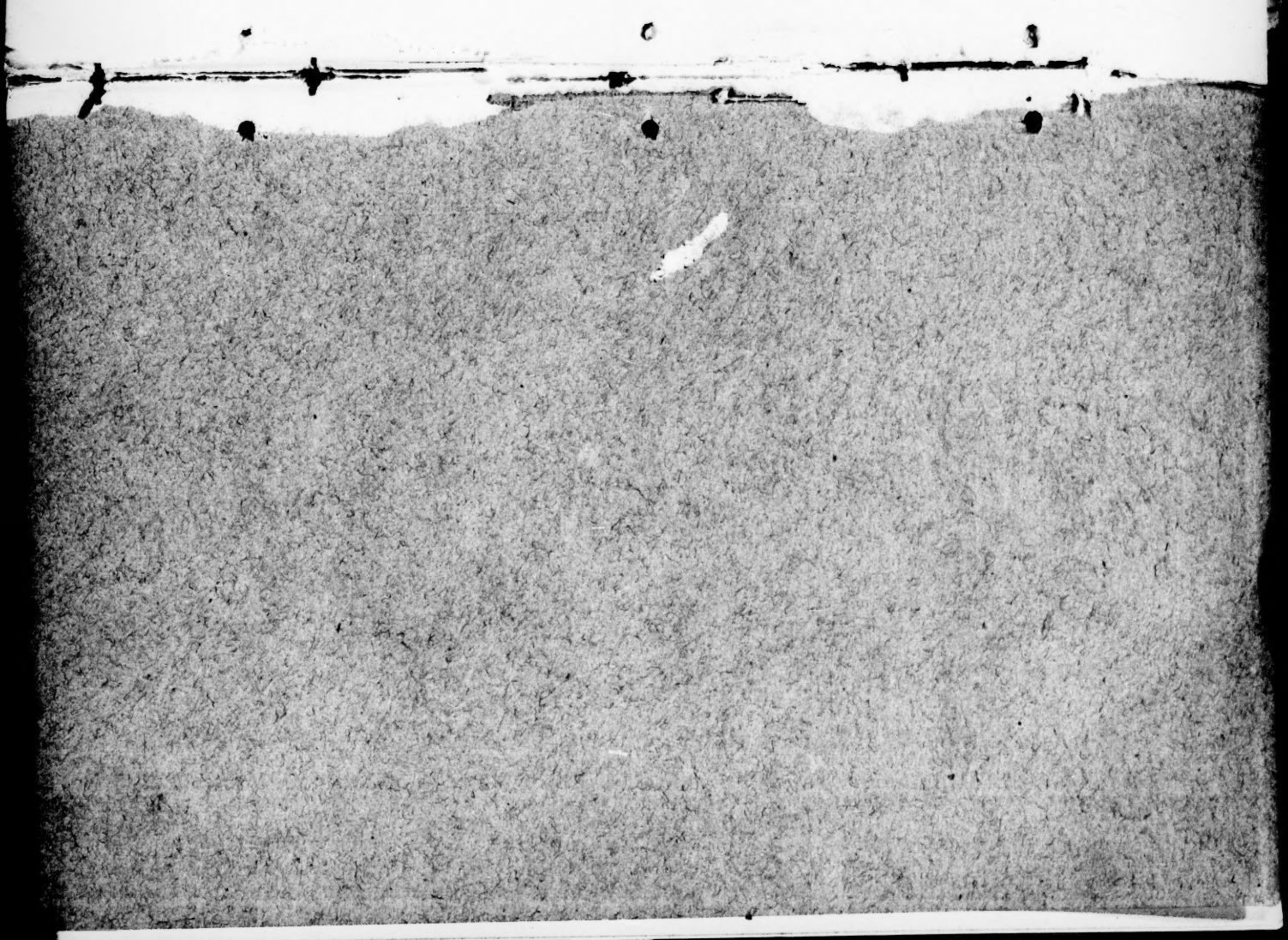
THE PACIFIC RAILROAD,
Appellant,
vs.
GEORGE E. KETCHUM, CORNELIUS K. GARRISON, JAMES SELIGMAN, THOMAS W. PIERCE, THE ATLANTIC AND PACIFIC RAILROAD COMPANY, HENRY F. VAIL and JAMES D. FISH, Trustees, JAMES BAKER, THE MISSOURI PACIFIC RAILWAY CO., and THE NATIONAL TRUST CO., OF NEW YORK.
Respondents.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

MOTION TO DISMISS APPEAL.

JAMES O. BROADHEAD,
Attorney for Respondents.

John J. Daly & Co., Printers, 213 North Third Street, St. Louis.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1878.

THE PACIFIC RAILROAD,
Appellant,
vs.
GEORGE H. KETCHUM, CORNELIUS K. GARRISON, JAMES SELIGMAN, THOMAS W. PIERCE, THE ATLANTIC AND PACIFIC RAILROAD COMPANY, HENRY F. VAIL and JAMES D. FISH, Trustees, JAMES BAKER, THE MISSOURI PACIFIC RAILWAY CO., and THE NATIONAL TRUST CO., OF NEW YORK.
Respondents.

No. 242.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

To the Honorable the Judges of the Supreme Court of the United States:

Now come the above named respondents, George E. Ketchum, James Baker and the "Missouri Pacific Railway Company," by their solicitors, James O. Broadhead and M. C. Day, and state:

That the "Pacific Railroad" is a corporation created by the laws of the State of Missouri; that the suit in this case was brought by George E. Ketchum and others to foreclose a mortgage executed by the said Pacific Railroad upon all its property and franchises to secure the payment of certain bonds therein named and described, and being the third mortgage bonds of said company; that all parties in interest having been made parties to this suit, the United States Circuit Court for the Eastern District of Missouri did, during the March term of said Court, for the year 1876, to-wit: On the 6th day of June, A. D. 1876, and by the consent of all parties to this suit, including the said "Pacific Railroad," render a final decree of foreclosure in said cause, by which Seymour D. Thompson, Master in Chancery, was ordered to sell all of said property and franchises; and shortly thereafter, to-wit: on the 24th day of June, 1876, said Court adjourned for the term. That said consent appears in the record in said cause, as follows:

"Now, therefore, the Court being fully advised in the premises, and by the consent of all the parties to this suit through their solicitors of record, thereupon and in consideration thereof, it is ordered, adjudged and decreed as follows, to-wit:"

That in pursuance of said decree and order of sale, the said Seymour D. Thompson did sell the same, and at the September term of said Court, for the year 1876, made report thereof to said Court, which said report of sale was, on the 6th day of October, 1876, in all things confirmed by the judgment of said Court, and the said Missouri Pacific Railway Company, another corporation created by the laws of

Missouri, is now the owner, by purchase, of said property and franchises so sold by said Thompson.

That on the 22d day of September, 1876, N. A. Cowdrey, Robert L. Cutting, Jr., Peter Marie, Frank A. Otis, George R. Fearing and others, stockholders of the said "Pacific Railroad," filed their motion and petition to intervene to set aside the decree of foreclosure and sale of June 6th, 1876, and for liberty to demur, answer, plead or appeal as advised, which said petition was presented on behalf of petitioners and all other stockholders of the said Pacific Railroad, and appears at page 47 of the printed Record in this case, which said motion was denied by the said Court, see page 54, and from the judgment of said Circuit Court overruling said petition and motion, the petitioners prayed for an appeal to the Supreme Court of the United States, which said prayer was denied; that thereupon the said petitioners applied to the Supreme Court of the United States for a writ of mandamus to compel the Honorable John F. Dillon and the Honorable Samuel Treat, judges of said Court, to grant an appeal; that an alternative writ of mandamus was issued by the Supreme Court, directed to said Judges, and made returnable on the day of October, A. D. 1876; that upon the return made by said Judges to said alternative writ, and after argument thereon, the Supreme Court refused to make a peremptory mandamus upon said judges, and dismissed the said writ, as will appear by reference to the opinion of said Court in case *ex parte* Cutting, reported in Vol. 94, U. S. Reports, page 14.

Your petitioners further say, that after the institution of the foreclosure suit of George E. Ketchum vs. The Pacific Railroad and others, to-wit: on the last Monday of March,

A. D. 1876, it being the 27th day of said month, the regular annual meeting of the stockholders of said company was held at the office of the company for the election of directors of said company, at which said meeting, Joseph L. Stephens, one of said stockholders, presided as chairman; that on that day directors were chosen, and thereupon the meeting adjourned over until the 29th of said month of March, when the following resolution was passed by said stockholders, on the motion of N. A. Cowdrey, viz:

Resolved, That when this meeting adjourns it adjourns to meet at the call of the chairman, on the request of ten thousand shares of stock.

And thereupon said stockholders' meeting adjourned. That thereafter, and during the fall of the year 1876, the said N. A. Cowdrey, claiming to represent ten thousand shares of the stock of said company, addressed a communication to the said Joseph L. Stephens, requesting him, as chairman of said stockholders' meeting, to call a meeting of the said stockholders in pursuance of the above resolution. That thereupon the said Stephens did call a meeting of the said stockholders to be held at the Lindell Hotel, in the city of St. Louis, on the 14th day of December, 1876, by publication in a newspaper to that effect, all of which will appear by reference to the affidavit of the said Joseph L. Stephens, hereto attached and marked Exhibit No. 1.

Your petitioners are not advised as to how many stockholders were represented at said meeting in person or by proxy, but they say that N. A. Cowdrey, George R. Fearing, Robert L. Cutting, jr., and David Rankin were present and

took part in said meeting, and they say that at this meeting the resolutions were adopted, which are attached to the petition for an appeal in this cause, marked Exhibit A, and which appear in the printed transcript in this case (No. 242) on pages 65, 66 and 67 of said printed transcript.

That amongst said resolutions was one attempting to remove James Baker as attorney for said "Pacific Railroad," and another attempting to appoint Messrs. Glover & Shepley as attorneys and solicitors for said company.

And your petitioners say that this is the only authority claimed, and the only authority, in fact, under which the said Glover & Shepley acted or claimed to act as attorneys for the corporation, the "Pacific Railroad."

But your petitioners say that the stockholders of said company had no power at said meeting held on the 14th of December, A. D. 1876, to manage the affairs of said corporation, nor to appoint attorneys or counselors, or solicitors, for said corporation, nor to remove the regular attorney of said corporation, appointed by the directors thereof, nor to take an appeal in this case, nor to perform any other corporate act for and in the name of said corporation.

Your petitioners further say that the provisions of the charter of the Pacific Railroad contained in the amendment thereof, passed by the General Assembly of the State of Missouri, and approved on March 1, 1851, in regard to the powers of the board of directors, and of the stockholders are as follows:

"§ 1. Section fourth of the act entitled An Act to incorporate the Pacific Railroad is hereby amended so as to read as follows: § 4. The stockholders of the company shall

meet on the last Monday of March in each year, at such place in the State as may be designated by the by-laws of the company, of which at least twenty days' previous notice shall be given in two or more newspapers published in the city of St. Louis, and elsewhere, if the board of directors see fit, and choose by ballot, by a majority of the votes present, to be given in person or by proxy, thirteen directors, all of whom shall be citizens and residents of this State, and shall be owners respectively of at least ten shares in the stock of said company, and qualified to vote for directors at the election at which they shall respectively be chosen; the said directors and those thereafter to be chosen in pursuance of the provisions of this act, at their first meeting shall choose by ballot one of their own number as president of said company; and the said president and directors shall conduct and manage the affairs and business of said company, until the last Monday in March then next ensuing, and until others are chosen; and may make and establish such by-laws, rules, orders and regulations, not inconsisteni with law, as to them may seem needful.

"§ 2. At every annual meeting the said stockholders shall have power to make, alter or repeal, by a majority of the votes given, any or all such by-laws, rules, orders and regulations as aforesaid, and do and perform every other corporate act authorized by their charter. The stockholders may meet at such other times and places as they may be summoned by the president and directors, in such manner and form, and giving such notice as may be prescribed by the by-laws, and the president, at the request in writing, of any number of stockholders representing not less than one-seventh in number and interest, shall call a special meeting, giving

the like notice, and stating specifically the objects of such meeting; and the objects stated in such notice and no other, shall be acted upon at such meeting; nor shall any business be transacted at any such special meeting, unless a majority of the stock shall be there represented; but the meeting may adjourn from day to day, or until such times as a majority in interest shall be present. So much of section fifteen of the said act as is inconsistent with the provisions of this section is hereby repealed."

Your petitioners further say that the day after the annual meeting of the stockholders, to-wit, on the 28th day of March, 1876, the new board of directors consisting of Messrs. Baker, Burr, Edgar, Ferguson, Garrison, Leighton, Leonard, Rowland, Stanard, Stephens, Samuels, Taussig and Chouteau, was organized by the election of Charles P. Chouteau as president, and J. L. Dearborne as secretary. That at said meeting the following resolution was offered, to wit:

"*Resolved*, That Messrs. Glover & Shepley be authorized to act as the attorneys for this company in all cases now pending in the United States Circuit Court, for the foreclosure of any mortgage upon the property of the company, and also in the proceedings instituted against the company in bankruptcy."

Which resolution was rejected by a vote of eleven to two. All of which will appear by reference to the proceedings of said Board, a certified copy of which is hereto attached marked Exhibit No. 2.

Your petitioners further say that the purchasers of the property and franchises of the Pacific Railroad at the sale thereof on the 6th of September, 1876, under the decree of foreclosure aforesaid, have long since sold out their interest

therein; that the same is now owned by the "Missouri Pacific Railway Co.," and that nearly all the stock of this last named company has passed by sale into the hands of other parties than those who owned it at the time it first became the purchaser of said property and franchises.

Your petitioners further say that N. A. Cowdrey, Peter Marie, Frank A. Otis, George Fearing, Robert L. Cutting, Jr., and Jacob Cromwell the same parties who in person or by their proxies held the meeting of stockholders on the 14th of December, A. D. 1876, at which they claimed to act for the Pacific Railroad, and to authorize an appeal to be taken in this case in the name of the corporation, did in March, 1876, and before the decree of foreclosure was rendered as aforesaid, in their own names and in the name of their associates, claiming to own and hold in their own right, and in trust for others, three thousand six hundred shares of the capital stock of the Pacific Railroad (it being a majority of the stock of the company issued), did make, as they allege, a valid and binding contract with Cornelius K. Garrison, then owning or controlling a majority in amount of the third mortgage bonds of said company, being the same bonds for the payment of which said decree of foreclosure was made, by which, in consideration that the said stockholders would relinquish all further opposition to said foreclosure suit, the said Garrison agreed that if he should become the purchaser of the property and franchises of the said Pacific Railroad at the foreclosure sale, that he would organize a new company and convey to the said new company the property so purchased at said foreclosure sale, and that of the stock of the said new company he would cause to be delivered to them in return for and in lieu of the stock of the Pacific Railroad,

thirty-six hundred full paid shares, of the par value of one hundred dollars each, amounting in the aggregate to $3,600,000 of the stock of the new company so to be organized. Whereupon and in consideration thereof, the said stockholders withdrew their opposition to said decree of foreclosure, and in open court consented to said decree of foreclosure, as will more fully appear by the papers hereto attached marked Exhibits No. 3 and No. 4. The said Exhibit No. 3 being a certified copy of the proceedings of a certain cause now pending in the Superior Court of the city of New York, wherein Peter Marie, Frank A. Otis, George R. Fearing, N. A. Cowdrey, Robert L. Cutting, Jr., are plaintiffs, and Cornelius K. Garrison impleaded with John T. Denny are defendants. The said Exhibit No. 4, being the affidavit of James Baker, Esq., attorney for the Pacific Railroad.

Your petitioners further say that the answer of the Pacific Railroad to the bill of foreclosure in this cause appears at pages 15 and 16 of the printed transcript in this cause, whereby it will appear that the said Pacific Railroad in their said answer prayed the Circuit Court to permit any of the stockholders of said company to become parties defendant to the said suit upon a proper showing, and to make such defense in the premises as they might see proper.

Your petitioners further say, that on the 7th day of October, A. D. 1876, a meeting of the board of directors of the Pacific Railroad was held in the city of St. Louis, at the request of N. A. Cowdrey, Peter Marie, Jacob Cromwell, Robert L. Cutting, jr., Frank A. Otis, George L. Kingsland and George R. Fearing, through their attorneys, Glover and Shepley, at which the last named parties requested the said board of ;ation directors to authorize them to use the name of the railroad

company in making a motion to set aside the decree of sale, and to dismiss the bill and proceedings in said cause, which the said board of directors declined to do; assuring the said stockholders, however, by resolution and letter to that effect, that they were willing to do all in their power to protect the interests of the stockholders, and that they had so acted from the commencement of said foreclosure suit, but that there was no defense to said foreclosure suit. All of which will appear by reference to the proceedings of said board, a certified copy of which is hereto attached, marked Exhibit No. 5.

Wherefore, and by reason of the facts above set forth, your petitioners say:

1st. That the appeal in this case was not taken by the "Pacific Railroad," nor by anyone authorized to act for said corporation in the premises.

2d. That the stockholders who have undertaken to act in the name of the "Pacific Railroad" have, for a consideration, assented to the decree of foreclosure in this cause.

3d. That the Pacific Railroad, through its proper attorney, James Baker, and with the consent of the board of directors of said company, did consent to said decree of foreclosure and said decree is therefore not appealable. *

Wherefore your petitioners move that said appeal be dismissed.

The grounds upon which this motion to dismiss the appeal is made are as follows:

1. By the terms of the charter the president and directors

* See Winchester vs Winchester 121 Mass. 127.
Morrill vs Lawrence 12 Johns 521.
Terry vs Bank 2 Otto 454.
Thompson vs Marshall 5 Otto 29

of the corporation are vested with the conduct and management of the affairs and business of the company (see sec. 1 of the amended charter above quoted), the only exception to this is, that the stockholders, at every *annual meeting*, have full power to do any corporate act authorized by the charter. This power exists, however, only at an annual meeting. But the meeting of December 14, 1876, was not an annual meeting, nor an adjournment of an annual meeting, as is claimed. The annual meeting adjourned on the 29th of March, 1876, and the meeting of December 14th, 1876, was a *called* meeting —called by the chairman of the stockholders' meeting, by publication in a newspaper. If the annual meeting had adjourned over to a certain day, it would have been an adjournment of the annual meeting; but this was not done. The distinction is a very plain one, and is very material so far as the rights and interests of the stockholders are concerned.

The annual meetings are fixed by the charter, and every member is supposed to have notice, but not so in regard to special or called meetings, and, therefore, such meetings are limited in their powers, unless it appear that every member of the corporation has received actual notice, or is actually present, in person or by proxy.

See Dillon on Municipal Corporations, §§ 223, 224.

Field on Corporations § 152 & Note p. 190.

2. The conclusion is irresistible, from the evidence in this case, that the same parties—representing the same stock—who as stockholders, held the meeting of December 14th, 1876, and authorized Glover and Shepley to take the appeal in this case in the name of the Pacific Railroad, did make a contract with the bondholders, by which, for a consideration

company in making a motion to set aside the decree of sale, and to dismiss the bill and proceedings in said cause, which the said board of directors declined to do; assuring the said stockholders, however, by resolution and letter to that effect, that they were willing to do all in their power to protect the interests of the stockholders, and that they had so acted from the commencement of said foreclosure suit, but that there was no defense to said foreclosure suit. All of which will appear by reference to the proceedings of said board, a certified copy of which is hereto attached, marked Exhibit No. 5.

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to be given by Garrison, they agreed to withdraw all opposition to the decree of foreclosure, and did withdraw such opposition, and consent to said decree. See subdivision in fifth and seventh of the amended petition in case pending in Superior Court of New York, Exhibit No. 3 to this motion. The consideration may not have been very valuable, because the property sold for only $3,000,000, at a competing sale, and if upon this property the new company to be organized should, as was proposed by Garrison, put a mortgage of $4,500,000 thereon, the stock at that time would be worth very little. But this was the agreement, and they have brought suit, as the testimony shows, against Garrison for $3,600,000, as damages for breach of this contract.

3. Not only did the Pacific Railroad, at the time the decree was rendered, consent to the decree, but after the sale was made, and the property turned over to the purchaser, as late as the 7th of October, 1876, at a formal meeting of the board, these same stockholders, by their attorneys, Glover and Shepley, in a communication, addressed to the board, say:

"You have consented to such decree being entered, and without such consent no such decree could have been entered."

This consent the directors, through their president, Mr. Chouteau, do not deny to have given, but they say, in effect, that a defense would have been useless; that the issue of the third mortgage bonds, whose validity had been assailed by these stockholders, was authorized by an almost unanimous vote of the stockholders; that these complaining stockholders

had an opportunity to defend, through Mr. Akers, who was admitted as a party to defend the foreclosure for the stockholders, including these very parties, and that they voluntarily withdrew after joining with him in the defense, and that, in the opinion of said board, no defense could be made.

These are briefly the reasons why your petitioners ask the dismissal of this appeal. The position of all the original parties to this suit has changed; the stockholders withdrew their defense, and after the sale, when they appeared again at the next term of the Court, and asked the right of appeal as parties in interest, the Court refused their prayer, and the Supreme Court sustained the Court below. The decree was then supposed to be final, the property bought in at the sale was conveyed to another corporation organized to run the road; new stock was issued; the road was put in repair; large expenditures have been and necessarily must have been made upon the property; the stock of the new company, representing the property acquired at the sale, has passed from the original owners, and six months after the decree of sale, the final decree in the case, parties who were not parties to the record at the time of the final decree, and who had assented to the final decree, undertake to revive a dead corporation at a meeting called without authority of law, and in its name to upset all that has been done, to the great prejudice and wrong of those who have become the innocent purchasers of the property.

JAS. O. BROADHEAD,
M. C. DAY,
Attorneys for Petitioners.

EXHIBIT No. 1.

CITY OF ST. LOUIS, }
STATE OF MISSOURI, }

Personally appeared before me John B. Roeder, a Notary Public within and for the city of St. Louis aforesaid, Joseph L. Stephens, who having been duly sworn, on his oath says, that on, and long prior to, the last Monday in March, 1876, he was a stockholder in the Pacific Railroad (of Missouri), a corporation duly incorporated under the laws of the State of Missouri; that on said last Monday, it being the 27th day of March, the regular annual meeting of the stockholders of said company was held at its office in the city of St. Louis, Missouri; that he was chosen chairman of said stockholders' meeting, and did preside over the same, and John L. Dearborne was chosen secretary of said meeting and acted as such; that after the transaction of such business as came before the meeting on that day, on motion of Mr. Cowdrey, said meeting adjourned to meet on the 29th of March, 1876, at ten o'clock A. M. of that day, at the office of the company. That said adjourned meeting was held at the time and place last above mentioned, and after the transaction of such business as came before it, on motion of Mr. N. A. Cowdrey, the following resolution was adopted:

"*Resolved*, That when this meeting adjourns it adjourns to meet at the call of the chairman on the request of ten thousand shares of stock."

That thereafter, on the day of , 1876, it being in the fall of said year, he received a communication from N. A. Cowdrey, from the city of New York, claiming to represent ten thousand shares of the stock of said company,

and requesting him to call a meeting of the stockholders thereof, whereupon he made a call for said stockholders' meeting to be held at in the city of St. Louis, Missouri, on the 14th day of December, 1876, which said call, so signed by me, was published in the newspapers at that time; that he was not present at the said stockholders' meeting, and took no part in its proceedings, but is informed and believes that such meeting was held on the said 14th day of December, 1876, at the Lindell Hotel in the said city of St. Louis, Missouri.

(Signed) J. L. STEPHENS.

STATE OF MISSOURI, }
CITY OF ST. LOUIS. } ss.

Sworn to and subscribed before me this 23d day of December, A. D. 1879. Witness my hand and official seal.

[SEAL.] JOHN B. ROEDER,
Notary Public, St. Louis, Mo.

EXHIBIT No. 2.

ST. LOUIS, March 28th, 1876.

Special meeting—organization of new Board. Present: Messrs. Baker, Burr, Edgar, Ferguson, Garrison, Leighton, Leonard, Rowland, Stanard, Stephens, Samuels, Taussig and Chouteau.

Meeting called to order by President Hays. Mr. Ferguson moved that the board proceed to an election of president and secretary.

Mr. Leighton offered the following amendment: "*Resolved*, that the board proceed to the election of a president, *pro tem.*, and a secretary, and that the election of all other officers be postponed until the further action of the board." The ayes and noes being called, the amendment was lost by the following vote: Baker, no; Burr, yes; Chouteau, yes; Edgar, no; Ferguson, no; Garrison, no; Leighton, yes; Leonard, yes; Rowland, no; Stanard, yes; Samuel, no; Stephens, yes; Taussig, no.

The motion of Mr. Ferguson then prevailed, and the board proceeded to an election, Messrs. Samuel and Stanard acting acting as tellers.

Mr. Ferguson nominated Mr. Chas. P. Chouteau for president. On balloting the following result was reported by the tellers: Mr. Chouteau, 11 votes; Mr. Leighton, 1 vote; Mr. Garrison, 1 vote. Mr. Chouteau was thereupon declared president of the board for the ensuing year. On motion of Mr. Stanard the election of Mr. Chouteau was made unanimous. Mr. J. L. Dearborn was then nominated for secretary. On balloting, the tellers reported the result as follows: Mr. Dearborn, 12 votes; Mr. Thompson, 1.

Mr. Dearborn was declared secretary for the ensuing year.

The following motion was offered by Mr. Leighton:

"*Resolved*, that Messrs. Glover & Shepley be authorized to act as the attorneys for this company in all cases now pending in the United States Circuit Court for the foreclosure of any mortgage upon the property of the company, and also in the proceedings instituted against the company in bankruptcy."

The roll being called on the foregoing resolution, the vote was as follows: Baker, no; Burr, no; Chouteau, no;

Edgar, no; Ferguson, no; Garrison, no; Leighton, yes; Leonard, yes; Rowland, no; Stanard, no; Stephens, no; Samuel, no; Taussig, no.

On motion of Mr. Garrison, it was resolved that the Farmers' Loan and Trust Company of New York be made the register and transfer agent of the stock of this company.

On motion meeting adjourned.

J. L. DEARBORN, *Secretary.*

STATE OF MISSOURI, }
CITY OF ST. LOUIS. }

Personally appeared before me, John P. Ellis, a Notary Public in and for said City and State, William Arnold, who is personally known to me, who on oath says he was duly elected secretary of the Pacific Railroad by the board of directors on October 7th, 1876, that he has never resigned or been removed from said office; that the record book of the proceedings of said Board of Directors has been in his possession ever since the said October 7th, 1876, and that the foregoing is a true and correct transcript from said records.

(Signed) W. ARNOLD.

Subscribed and sworn to before me, this 12th day of December, 1879. (Signed) JOHN P. ELLIS,

[SEAL.] *Notary Public.*

Commission expires May 8, 1881.

EXHIBIT No. 3.

N. Y. SUPERIOR COURT.—GENERAL TERM.

PETER MARIE, FRANK A. OTIS, GEORGE R. FEARING, NELSON A. COWDREY, ROBERT L. CUTTING, JR., and JACOB CROMWELL,

against

CORNELIUS K. GARRISON and JOHN T. DENNY.

At a Special Term of the Superior Court of the City of New York, held at the Court House in the City of New York, on the 9th day of January, in the year one thousand eight hundred and seventy-nine.

Present—Hon. Gilbert M. Speir, Judge.

PETER MARIE, FRANK A. OTIS, GEO. R. FEARING, N. A. COWDREY, ROBERT L. CUTTING, Jr., and JACOB CROMWELL
against
CORNELIUS K. GARRISON, impleaded with JOHN T. DENNY.

This action having been brought to trial on the issue of law joined herein, after hearing Henry L. Clinton, Esq., of counsel for defendant Garrison, in support of the demurrer, and William A. Beach, Esq., of counsel for the plaintiffs in opposition, and on motion of Tremain & Tyler, plaintiffs'

attorneys: *Ordered*, That said demurrer be overruled, and that plaintiffs have judgment on the complaint, but with leave to the defendant Garrison, to interpose and serve an answer herein within twenty days from the date of the service of this order, upon payment of costs; and in case said defendant shall take an appeal to the General Term of this Court from this order within five days from the date of the service of this order, all proceedings on the part of the plaintiff upon this order shall be stayed until the hearing and decision of such appeal and the entry of the order thereon; and the said twenty days allowed to the defendant to answer herein shall not commence to run until the decision of such appeal and the entry and service of the General Term thereon.

[A COPY.] THOMAS BOESE, *Clerk.*

SUPERIOR COURT OF THE CITY OF NEW YORK.

PETER MARIE, FRANK A. OTIS, GEO. R. FEARING, N. A. COWDREY, ROBERT L. CUTTING, Jr., and JACOB CROMWELL,

against

CORNELIUS K. GARRISON, impleaded with JOHN T. DENNY.

Take notice that the defendant, Cornelius K. Garrison, appeals to the General Term of this Court, from so much of the order of the Special Term of this Court, this day entered

in this action, as overrules the demurrer herein, and directs judgment for the plaintiff on the complaint.

New York, January 9, 1879.

W. B. PUTNEY,
Attorney for the defendant,
Cornelius K. Garrison.

To Messrs. Tremain & Tyler, plaintiffs' attorneys.

To Thomas Boese, Clerk of said Court.

AMENDED COMPLAINT.

IN THE SUPERIOR COURT OF THE CITY OF NEW YORK.

PETER MARIE, FRANK A. OTIS, GEORGE FEARING, N. A. COWDREY, ROBERT L. CUTTING, Jr., and JACOB CROMWELL,

Plaintiffs,

against

CORNELIUS K. GARRISON and JOHN T. DENNY,

Defendants.

The plaintiffs above named, by Tremain & Tyler, their attorneys, as and for their amended complaint, complain of the above named defendants, and thereupon the said plaintiffs state:

First.—That the plaintiffs above named and the defendant, John T. Denny, at the several times hereinafter mentioned, owned and held, either in their own right or in trust for others, with full power of disposition as hereinafter related, thirty-six thousand shares of the capital stock of the Pacific Railroad of Missouri (a corporation duly created and organ-

ized under and by virtue of the laws of the State of Missouri) of one hundred dollars each, amounting in the aggregate to the sum of ($3,600,000) three millions six hundred thousand dollars, at the par value of said stock.

Second.—That the defendant, Garrison, at the same time held, or claimed to hold, a majority of the bonds, viz: $2,200,000 out of an issue of $4,000,000 of bonds issued by said Pacific Railroad, known as third mortgage bonds; that said bonds were of doubtful validity as a mortgage security, or as a valid obligation against said Pacific Railroad; that it was claimed by the stockholders of said Pacific Railroad that said bonds were collusive and fraudulent, and that the mortgage given to secure the payment of the same was unauthorized; that the stockholders had never authorized or consented to the mortgage, as is required by the laws of the State of Missouri they should authorize, that the same might be a valid mortgage; that the bonds and mortgage were got up, executed and delivered collusively and fraudulently by the then directors of the Pacific Railroad; that by the terms of the bonds, the principal thereof did not become due until the first day of May, 1895; that said Garrison and others of said bondholders claimed that there was then past due two semi-annual coupons for interest upon said bonds; that said defendant expressed great solicitude to get said bonds adjudicated and established as valid; that said railroad at that time was in the hands of directors hostile and averse to the stockholders thereof.

Third.—That a collusive suit in the interest of said Garrison and those associated with him, had been commenced in November, 1875, by one George E. Ketchum, who claimed to

be a holder of said bonds, to foreclose said mortgage, which suit was then pending in the Circuit Court of the United States for the Eastern District of Missouri; that said Garri- was admitted as a co-complainant in said suit April 3d, 1876, and became the principal and active party in prosecuting the same.

That certain stockholders of said Pacific Railroad had, previous to the making of the agreement hereinafter set up, intervened in said foreclosure suit, and filed an answer and cross-bill alleging collusion and fraud on the part of the directors of said Pacifie Railroad in the issue of said bonds, and in the mortgage made to secure the payment thereof, and in the defense or want of defense, made in said foreclosure suit; that some of the plaintiffs above named had filed a petition in said foreclosure suit, to be made parties defendant to said suit, and to be allowed to intervene and defend the same in their own behalf, and in behalf of all other stockholders.

Fourth.—That said Pacific Railroad is about 283 miles in length, extending from St. Louis, westerly to Kansas City, passing through Jefferson City, the capital of the State, and is one of the trunk lines of the country; and the plaintiffs aver, upon information and belief, that the earnings of said railroad are very large, amounting in gross to over $3,800,000 per annum, and after paying operating expenses and taxes the net earnings amount from $1,500,000 to $2,000,000 per annnm; that the fixed charges for interest upon mortgages made by said Pacific Railroad, and prior in lien to the said $4,000,000 third mortgage do not exceed $700,000 per annum, leaving as net earnings, the sum of $800,000 to

$1,300,000, or after paying interest upon the said $4,500,000 of mortgage it will leave as net earnings $485,000 to $985,000, which makes the stockholders' interest, the equity of redemption in said railroad of great value; viz., of the value of $8,000,000.

Fifth.—That on or about the 29th day of March, 1876, with a view of compromising said conflicting claims, and establishing the validity of said debt of $4,000,000, in the hands of said Garrison, the defendant, Garrison and others of his associate bondholders, and to prevent the plaintiffs from defending said foreclosure suit; and in consideration of the relinquishment by the plaintiffs of all further opposition to said foreclosure suit, the said Garrison, the defendant, entered into an agreement with plaintiffs, evidenced in part by a letter written by him to some of the plaintiffs, and the defendant Denny, a copy of which is hereto attached, marked "A," and the same is made a part of this complaint.

Sixth.—The plaintiffs aver that they and the defendant Denny performed and fulfilled all the preliminary obligations in the said agreement contained and agreed to be performed on their part and behalf, and in consequence thereof, said defendant, Garrison, was enabled to procure a judgment and decree of foreclosure on or about the 6th of June, 1876, and a sale of said premises on or about the 6th day of September, 1876, which sale was confirmed by the Court in the month of October, 1876, viz., October 6th, which confirmation was modified October 23d, 1876.

Seventh.—The plaintiffs say that in the month of June, 1876, at and in the City of New York, the plaintiffs and said

Denny, at the special interest and request of the said defendant Garrison, surrendered the aforesaid letter to said Garrison, and in consideration of such surrender and of the plaintiffs consenting to a modification of the terms of said agreement with said Garrison as contained, in part, in said letter, said Garrison promised to and agreed with the plaintiffs and said Denny, that in the event the said Pacific Railroad (of Missouri) should be sold under the decree of foreclosure in said suit, and in event that he, said Garrison, or any one for him, should become the purchaser thereof, he would forthwith organize a successor company under the laws of the State of Missouri, and would convey or cause to be conveyed thereto all the property of the said Pacific Railroad purchased at the said foreclosure sale under said decree; that the capital of the said successor company should not exceed eight millions of dollars in amount, and that after executing new bonds and a new mortgage in the amount of four millions five hundred thousand dollars, to be issued and used in satisfying and paying off the claims of the said third mortgage bondholders, or of the holders of the income and improvement bonds of said company; he would deliver to the said plaintiffs and said Denny, in return for the amount of stock of the Pacific Railroad so as aforesaid held by them, thirty-six thousand full paid shares, of the par value of one hundred dollars each, amounting in the aggregate to the sum of $3,600,000, which stock was to be issued by the said successor company, and the said Garrison then and there promised to and agreed with the plaintiffs and said Denny to purchase the said property at the said foreclosure sale, and assured them of his power and intention of protecting them in their rights of property as stockholders of the said Pacific Railroad.

That as the agreement between the plaintiffs and said Denny and the defendant Garrison was executory on the part of said Garrison, the plaintiffs were induced by said Garrison to make the same, because of his, the said Garrison's representations then and there made to the plaintiffs, in this, that he, the said Garrison, had great wealth and the pecuniary ability to buy said railroad; that he, for himself and for Russell Sage, held $1,400,000 of said bonds secured under the mortgage which was sought to be foreclosed; that he had sufficient influence with the holders of said bonds to induce them to act with him, and as he acted; and that he would so get them to act, or would pay them in cash the *pro rata* which they would be entitled to receive if the road was sold. By reason of the trust and confidence reposed in said Garrison, and in his representations and promises, the plaintiffs were induced to make said agreement with him. The plaintiffs aver that said Garrison agreed to use his whole wealth, power and influence to carry into effect the agreement then and there made by him with the plaintiffs.

The plaintiffs aver that without their co-operation and consent, the decree of foreclosure and sale would not then have been made, or made at all until after a trial by the Court, the result of which trial was in doubt. The plaintiffs claiming, as above set forth, in relation to the bond and mortgage given to secure the payment of the same.

Eighth.—The plaintiffs say that afterwards, and on or about the 6th day of September, 1876, the said Pacific Railroad and the premises and property belonging to said company were sold under the said decree in said suit, which sale was confirmed by the Court as above set forth.

That at said sale James Baker, the solicitor of said Pacific Railroad in said suit, professed to purchase said mortgaged premises and bid in the same at the sum of $3,000,000, which was at the rate of 75 per cent. upon the full amount of said $4,000,000 mortgage; that the said Baker paid in said third mortgage bonds the sum bid by him to the extent of $3,948,000 of said bonds, which were received *pro rata* for said purchase and gave the undertaking of the defendant Garrison, and of Charles Chouteau, the President of the said Pacific Railroad, and one D. R. Mangam, for the further fulfillment of his bid.

That the means of making said bid, or for the complying therewith, was mostly furnished to said Baker by the defendant Garrison, and the plaintiffs aver upon information and belief, that the said Garrison, or the successor company, formed by the said Garrison and others, paid to the said Baker, for his services, a large sum, viz., $25,000.

That through said Baker, the said Garrison became the real purchaser of said mortgaged premises, and, in connection with Baker, proceeded to organize and did organize a new successor railroad company, called the *Missouri Pacific Railway Company;* that said Baker, at the request of and for the use and benefit of the said Garrison, and others of said bondholders, for whom he, said Garrison, acted, conveyed and assigned his purchase of said premises to said *Missouri Pacific Railway Company.*

That said Baker was incapacitated from purchasing said railroad at said sale in his own behalf, by reason of his being the solicitor of the plaintiffs' company, the Pacific Railroad, and could only purchase, if at all, as the representative of the holders of said bonds secured under the mortgage

which was sought to be foreclosed, and which he appeared in Court as solicitor to defend against.

That said Garrison, regardless of his duties and obligations to the plaintiffs, made an agreement with certain of said bondholders, by which he, the said Garrison, assumed the purchase made by said Baker, and subsequently organized a new or successor railroad company, in which organization he then and still does refuse to allow the plaintiffs any interest or benefit.

That the said Garrison was at its incorporation elected or or selected himself as the president of said successor company, and has ever since retained said office.

That, although often requested so to do, the said Garrison has refused and does refuse to fulfill his said contract and agreement with the plaintiffs, and to issue, or cause to be issued and delivered to the plaintiffs thirty-six thousand shares of stock in said company, in exchange for the stock of the Pacific Railroad, so as aforesaid held by the plaintiffs.

All of which is to the damage of the plaintiffs in the sum of three million six hundred thousands of dollars, with the interest thereon from said 24th day of October, 1876.

That the defendant, John T. Denny, refuses his consent to be joined as a plaintiff, and he is therefore made a party defendant in this action.

Wherefore the plaintiffs demand judgment against the defendant, Garrison, in the sum of three million six hundred thousands of dollars, with interest from October 24th, 1876, and the costs of this action.

The plaintiffs by

TREMAIN & TYLER,

Attorneys.

City and County of New York, ss.:

On the 4th day of April, 1878, personally appeared before the subscriber, Peter Marie, Robert L. Cutting, Jr., N. A. Cowdrey, all of whom are plaintiffs in the above entitled cause, and each for himself made oath of the truth of the allegations of the foregoing complaint, of their own knowledge, except where the same are stated to be alleged upon information and belief, and those allegations they believe to be true.

PETER MARIE,
R. L. CUTTING, JR.
N. A. COWDREY.

Subscribed and sworn to before me, the day and year above written.

BLOOMFIELD LITTLE,
Notary Public,
N. Y. Co.

EXHIBIT A.

Copy of agreement of C. K. Garrison, made March 29th, 1876, attached to complaint of Peter Marie and others *vs.* C. K. Garrison.

To Messrs. N. A. Cowdrey, Robert L. Cutting, Jr., Peter Marie, Frank A. Otis, George R. Fearing and John T. Denny.

Gentlemen,—In the event that the Pacific Railroad of Missouri is sold under foreclosure proceedings in the suit of

George E. Ketchum, or any foreclosure suit now pending to foreclose the so-called third mortgage bonds of said Pacific Railroad Company, and in the event that I, or any one for me, becomes the purchaser thereof, then I will agree to sell and convey said railroad as follows:

If, at any time within six months from the date of such purchase by me, you shall organize a successor company under the laws of the State of Missouri, and said Company shall pay to me all sums of money (with interest thereon at the rate of seven per cent. per annum, from the date of my payment of the same), which I shall have expended in procuring or making good the title to said railroad, and shall further pay to me all sums of money, with interest, at seven per cent, that I may have expended up to the date of the said purchase by said successor company organized by you, in the care, custody, control, and running of said railroad, over and above the income received by me therefor; then I will convey to you, or the said successor company organized by you, the said railroad purchased by me at said foreclosure sale, upon the further condition, however, that said successor company shall immediately, upon the making of the said conveyance to it of said railroad, make and issue its bonds maturing in thirty years from their date, in sums of one thousand dollars each, and to an amount not exceeding four million five hundred thousand dollars, bearing seven per cent interest, payable semi-annually, in lawful money of the United States, the first installment of interest to be payable May 1 (1877), eighteen hundred and seventy-seven, which said bonds are to be secured by a mortgage or deed of trust on the said railroad and franchises which shall be conveyed by me to said successor company.

Of the said $4,500,000 new bonds, two million four hundred and thirty-one thousand dollars ($2,431,000) shall be delivered to me or such associates as I represent, for the face value, and eighteen months interest of twenty-two hundred (2,200) dollars, third mortgage bonds, which I now hold. The remainder of said new mortgage bonds, viz., two million and sixty-nine thousand dollars ($2,069,000) shall either be given in exchange for a like amount of old third mortgage bonds or outstanding "improvements" and "income bonds," or the same may be sold upon the best available terms for the interest of the stockholders of the said successor company, and the proceeds of the sale applied to the payment of the money that may be required to purchase or pay any outstanding third mortgage bonds not represented by me, or any of the outstanding "income" or "improvement bonds."

It is understood that I may, if I desire, advance or loan the amount necessary to purchase any of the outstanding third mortgage bonds or "income" or "improvement bonds" above mentioned, and to hold the said $2,069,000, or a proportionate part of them, as collateral to secure the advances and interest thereon, at seven per cent. so made by me.

If there are any bonds remaining after accomplishing the above objects, they are to belong to the said successor company.

The said new mortgage, and the bonds issued thereunder, shall be made under the advice of council learned in the law, and shall give as ample and full security for the payment of the bonds secured thereby as can be given upon the premises mortgaged or conveyed to the said successor company. And, if it can be lawfully done, in the articles of association of

said successor company or otherwise, then the holders of said new mortgage bonds shall be entitled to ten votes at all stockholders' meetings of said successor company for each bond so held by them.

The said successor company shall issue a capital stock to the extent of seven million two hundred thousand dollars ($7,200,000), and you are to transfer the said stock to such of the present stockholders of the Pacific Railroad of Missouri as shall have co-operated with you, and to such as you think have any legal or equitable claims upon you for such stock; in both cases the holders of said Pacific Railroad stock are to transfer the same to the successor company, or to the trustees for their use. Any stock remaining in your hands, after satisfying the claims upon you as above, shall belong to the successor company, and shall by you be transferred to said company as unissued stock.

All expenses of the various litigations shall be paid from the earnings of the railroad, either by the receivers or by the successor company.

My services and expenses shall be paid by the successor company, and your services and expenses shall be paid by the successor company, or you may sell sufficient of the capital stock remaining in your hands which would otherwise be returned to the successor company to repay yourselves for your services and expenses.

I wish it understood that you or either of you, or any other person at your instance or solicitation, may purchase said premises at said foreclosure sale, and I will do nothing to prevent competition or to prevent others from bidding at the sale. I simply agree that if the premises are sold in the said foreclosure suit, and I become the purchaser, then I will

sell the same to you, or the successor company organized by you, upon the terms above set forth.

But I expressly stipulate that unless all sums of money which I may have expended in the purchase of said railroad as aforesaid, and all sums which I may have expended for and on account of the same as aforesaid, shall be paid to me by you or by said successor company within six months after the date of my becoming the purchaser of said railroad, then this agreement is to be null and void, and there shall be no right of purchase by you, or by any company organized by you, of the said railroad.

Time is the essence of this agreement, and the payment to me of the said sums of money laid out and expended by me as aforesaid, with interest, within the said period of six months, is a condition precedent to your right, or to that of said successor company, to purchase said railroad from me in the event that I become the purchaser thereof as aforesaid.

St. Louis, Mo., March 29th, 1876.

C. K. GARRISON.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.

I, William H. Bowers, a notary public of the State of New York, duly commissioned and sworn, and dwelling in said city and county, do hereby certify that on the day of the date hereof I compared the foregoing copy of an original letter with the said original, and found the same to be a true and correct of such original, and the whole of the same.

Witness my hand and notarial seal, this 23d day of June, A. D., 1876.

[L.S.]

WILLIAM H. BOWERS,
Notary Public, N. Y. Co.

DEMURRER TO AMENDED COMPLAINT.

IN THE SUPERIOR COURT OF THE CITY OF NEW YORK.

PETER MARIE, FRANK A. OTIS, GEORGE R. FEARING, N. A. COWDREY, ROBERT L. CUTTING, JR., and JACOB CROMWELL,

Plaintiffs,

against

CORNELIUS K. GARRISON and JOHN T. DENNY,

Defendants.

The defendant, Cornelius K. Garrison, for a demurrer to the amended complaint herein, shows and assigns for grounds of said demurrer as follows, to-wit:

First.—That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

Second.—That it does not appear from the complaint that the plaintiffs or either of them, have the legal capacity to sue this defendant; inasmuch as there is no averment in said complaint showing whether plaintiffs sue in their own right, or in trust for others; and no authority is showu for suing in trust for others, and no specific interest in the matters

complained of is shown to exist in the plaintiffs or either of them, so that it does not appear that the plaintiffs have any authority or capacity to sue this defendant, either for themselves or in trust for others.

Third.—That there is a misjoinder of parties plaintiff, inasmuch as it does not appear from said complaint, that the plaintiffs have any joint cause of action, or any right which authorizes them to unite therein; and said complaint further fails to show any state of facts such as authorize the uniting of the plaintiff, Jacob Cromwell, with the other plaintiffs named in the complaint.

Fourth.—That there is a defect of parties plaintiff in this case, inasmuch as if said complaint is to be construed as averring that persons other than the plaintiffs and the defendant Denny are interested, or beneficiaries in the premises and agreements sued on, and if any joint right of action is shown or averred in said complaint, then such persons others than the plaintiffs are necessary parties plaintiff in this suit, it not appearing that plaintiffs have any right to sue in their behalf, or to represent them in this suit.

Therefore, this defendant prays that said complaint be dismissed, and for his costs.

E. L. ANDREWS,
Att'y for Deft. Garrison.

MELVILLE C. DAY,
Of Counsel for Deft. Garrison.

At a general term of the Superior Court of the city of New York, held at the Court House thereof, in the city of New York, on the 30th day of April, 1879.

Present—Hon. John Sedgwick, Hon. Hooper C. Van Vorst, Judges.

PETER MARIE AND OTHERS,
Plaintiffs,
against
CORNELIUS K. GARRISON AND ANOTHER,
Defendants.

The appeal by the defendant, Cornelius K. Garrison, from the order of the special term of this Court, entered herein on the 9th day of January, 1879, overruling the demurrer of said defendant, Garrison, to the amended complaint of the plaintiffs herein, having come on to be heard before the said judges of this Court, at a general term thereof, held on the 10th day of March, 1879, at the County Court House, in the city of New York.

And after hearing Henry L. Clinton and Geo. F. Comstock, Esquires, of counsel for the said appellants, and William A. Beach, Esq., of counsel for the respondents, and due deliberation being had;

Now, on motion of W. B. Putney, Esq., attorney for said defendant, Garrison.

It is ordered that the said order of the special term of this Court overruling said demurrer, be and the same is hereby reversed, and that said defendant, Garrison, have judgment thereon, with costs, but

with leave to the said plaintiffs to amend their complaint, within twenty days from the date of the service of this order, upon payment to the said defendant, or his attorney, of one hundred and ninety-five dollars and thirty cents, his costs and disbursements herein.

Enter. J. S., J.

City, County and State of New York, ss.

William B. Putney, being duly sworn, deposes and says, that a copy of the within order was duly served upon Tremain & Tyler, plaintiffs' attorneys herein, on the 1st day of May, 1879, as by their admission of service hereon endorsed appears, and that deponent is the attorney for defendant, Garrison, herein, and that no amended complaint has been served upon him, as allowed by the within order.

W. B. PUTNEY.

Sworn to before me, this 10th day of June, 1879.

FRANK P. SLADE, Notary Public,
N. Y. and King's Co.

(Endorsed.) Due service of a copy of the within order is hereby admitted this day.

Dated May 1st, 1879.

TREMAIN & TYLER,
Plaintiffs' Attorneys.

SUPERIOR COURT OF THE STATE OF NEW YORK.

PETER MARIE AND OTHERS,
Plaintiffs,
against
CORNELIUS K. GARRISON, impleaded with another,
Defendants.

This action has been heretofore at a special term of the Superior Court of the city of New York, held at the court-house in the city of New York, on the 9th day of January, 1879, brought to trial on the issue of law joined in the same by the demurrer to the plaintiffs' amended complaint, interposed by said defendant, Cornelius K. Garrison; and after hearing Henry L. Clinton, Esq., of counsel for the defendant, Garrison, in support of the demurrer, and William A. Beach, Esq., of counsel for the plaintiffs, in opposition, and on motion of Tremain & Tyler, plaintiffs' attorneys, it having been "ordered "that said demurrer be overruled, and that plaintiffs have "judgment on the complaint, but with leave to the defendant, "Garrison, to interpose and serve an answer herein within "twenty days from the date of the service of this order, upon "payment of costs, and in case said defendant shall take an "appeal to the General Term of this Court, from this order, "within five days from the date of the service of this order, "all proceedings on the part of this plaintiff upon this order "shall be stayed until the hearing and decision of such "appeal and the entry of the order thereon; and the said "twenty days allowed to the defendant to answer herein

" shall not commence to run until the decision of such appeal " and the entry and service of the General term thereon."

And the said defendant, Garrison, having, on the said ninth day of January, 1879, appealed from so much of said order of the Special Term as overrules the demurrer and directs judgment for the plaintiff on the complaint, and the appeal of the said defendant, Cornelius K. Garrison, from said order having come on to be heard at a General Term of this Court, held on the tenth day of March, 1879, at the County Court House in the City of New York, and after hearing Mr. Henry L. Clinton, and Mr. George F. Comstock of counsel for said defendant, Garrison, in support of said demurrer, and Mr. William A. Beach, of counsel for said plaintiffs in opposition, and due deliberations had, and the order and decision of the Court upon said appeal having been filed, whereby the said order of the Special, overruling said demurrer, is reversed, and it is ordered that said demurrer be sustained, and that said defendant, Garrison, have judgment thereon, with costs, but with leave to the said plaintiffs to amend their complaints within twenty days from the service of said order, upon payment to the said defendant, or his attorney, of one hundred and ninety-five and thirty hundredths dollars, his costs and disbursements herein, and it appearing that said order and decision of said General Term was served upon the plaintiffs' attorneys on the first day of May, 1879, and that the plaintiffs have not amended their complaint herein as by said order of the General Term allowed.

Now upon reading and filing said order of the General Term and proof of service of the same, and affidavit of William B. Putney, that no amended complaint has been

served, and upon motion of William B. Putney, attorney for defendant Cornelius K. Garrison, it is ordered and adjudged that the amended complaint of the plaintiffs herein be, and the same is hereby dismissed, and that the defendant, Cornelius K. Garrison, have judgment against the plaintiffs for costs and disbursements adjusted at one hundred and ninety five and thirty hundreths dollars, as by said order appears.

$195.30. THOMAS BOESE, *Clerk*

SUPERIOR COURT OF THE CITY OF NEW YORK.

PETER MARIE and others, Appellants.
against
CORNELIUS K. GARRISON, impleaded with another, Respondent.

SIR: Please take notice that the plaintiffs in the above entitled action hereby appeal to the Court of Appeals from the judgment and determination of the General Term of this Court herein entered in the office of the Clerk of this Court, on the 11th day of June, 1879, reversing the order of the Special Term entered on the 9th day of May, 1879, overruling the demurrer of the defendant, Garrison, and dismissing the complaint in this action, with costs, in the sum of one hundred and ninety-five and thirty hundredths dollars, and for each and every part of said judgment.

Dated New York, June 16, 1879.

Yours, &c.,

TREMAIN & TYLER,

Plaintiffs' attorneys, 107 Broadway, N. Y.

To Thomas Boese, Clerk N. Y. Superior Court.

W. B. PUTNEY, Esq., attorney for defendant Garrison.

SUPERIOR COURT OF THE CITY OF NEW YORK.

PETER MARIE and others, Respondents, *against* CORNELIUS K. GARRISON and another, Appellants.	Clerk's office Superior Court of the City of New York.

I, Thomas Boese, Clerk of the Snperior Court of the City of New York, having compared the annexed copy General Term Judgment Roll, notice of appeal to Court of Appeals and Special Term order in the above entitled action, with the original on file in this office, do certify that the same are correct transcripts therefrom, and of the whole of said originals.

In witness whereof, I have hereunto subscribed my name, and affixed the seal of the Superior Court of the City of New York, this twentieth day of December, A. D. 1879.

[SEAL.] THOMAS BOESE, *Clerk.*

EXHIBIT No. 4.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1878.

THE PACIFIC RAILROAD,
Appellant,
vs.
GGORGE H. KETCHUM, CORNELIUS K. GARRISON, JAMES SELIGMAN, THOMAS W. PIERCE, THE ATLANTIC AND PACIFIC RAILROAD COMPANY, HENRY F. VAIL and JAMES D. FISH, Trustees, JAMES BAKER, THE MISSOURI PACIFIC RAILWAY CO., and THE NATIONAL TRUST CO., OF NEW YORK.
Respondents.

No. 242.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

I, James Baker, of St. Louis, Missouri, being duly sworn, do depose and say, that before and at the time of the institution of the suit of George E. Ketchum against the Pacific Railroad of Missouri and others, defendants, in the Circuit Court of the United States for the Eastern District of Mis-

souri, November 11, 1875, and during the pendency of said suit, and until after the final decree was entered, I was the attorney of the Pacific Railroad of Missouri, one of the defendants; that I filed, on the 7th of February, 1876, the answer of the said company as the same now appears of record, by the direction of the board of directors, to whom, when in session, the answer as filed, was submitted and approved.

At that time, some of the stockholders claimed that defenses existed to the mortgage which was being foreclosed, and for this reason the answer so filed called attention to that fact, and asked "the Court to permit any of the stockholders aforesaid to become a party defendant to this suit, upon a proper showing, and make such defense in the premises as they may see proper."

In March, 1876, the regular annual meeting of the stockholders of the said Pacific Railroad was held in St. Louis; that at such meeting, Messrs. N. A. Cowdrey, Robert L. Cutting, Jr., Peter Marie, Frank A. Otis, George R. Fearing, and John T. Denny, as, and purporting to be, and to act as a committee of the stockholders, were present, and controlled and voted, in person or by proxy, nearly all the stock, and as such owners and representatives, having, as they informed me, as the attorney of the Pacific Railroad, effected a satisfactory arrangement with C. K. Garrison, (who was largely interested in the bonds of the road) directed me to favor and assist the bringing of the said foreclosure suit to a decree in favor of the plaintiffs as soon as under the rules and practice of the Court it could be done; afterwards, and during the month of April, 1876, an effort was made by the plaintiffs to obtain a decree.

At that time, the said persons above named, or a majority of them, were present in Court, and I distinctly remember that Mr. N. A. Cowdrey, Robert L. Cutting, Jr., Peter Marie were present.

When the matter of granting a decree came up in Court, a stockholder, by the name of Akers, objected, whereupon Mr. N. A. Cowdrey announced in open Court, that Akers was not a stockholder, and that he, Cowdrey, held the very certificate on which Akers based his right to object, and for that reason insisted to the Court that Akers' objection ought not to be entertained.

Mr. Akers' objection, and that of the County of St. Louis, had the effect to postpone the cause until June, when the suit passed to a decree.

None of the said stockholders, or committee of stockholders ever withdrew or modified their previous instructions to me to favor and assist in the procuring of the said decree, but on the contrary, continued to favor the same.

Mr. John R. Shepley was the attorney of the stockholders, and was present in Court, both in April and June, and urged the Court to render a decree as prayed in the bill, and was also present at his own office in St. Louis, with Mr. James O. Broadhead, Mr. Frank J. Bowman, and myself, assisting and taking part in settling the form of the decree to be entered, and agreed to the same as it was afterwards entered, and was present, assenting to the same, when it was ordered to be entered. Subsequently, at the sale, in September, 1876, under the decree, said C. K. Garrison and myself (I being then the representative of a majority of the bondholders) became competing and adversary bidders for the property; several bids were made by each of us, and the

property was struck off to me as the highest bidder, and the sale was afterwards confirmed without objection from any quarter, and a new company organized, to which I conveyed the property, and new bonds and stock were issued. I furthermore state that the said decree was rendered by the direction and consent and procurement of both the directors and stockholders; when said decree was rendered, not a single stockholder, so far as I knew, objected to the said decree.

(Signed) JAMES BAKER.

THE STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.

The foregoing affidavit was subscribed and sworn to before me, this 24th day of December, 1879, by the said James Baker, and I certify that I am neither counsel nor attorney for either of the parties, nor am I interested in the event of the cause.

Witness my hand and seal, official hereto set, the date above written.

[SEAL.] CHAS. FOX,
Notary Public, King's County.

(Certificate filed in N. Y. County.)

EXHIBIT No. 5.

ST. LOUIS, October 7th, 1876.

SPECIAL MEETING.

Present: Messrs. Chouteau, Garrison, Burr, Edgar, Baker, Stephens, Ferguson, Samuels and Taussig.

The president, Charles P. Chouteau, Esq., called the meeting to order.

Mr. D. R. Garrison proposed that Mr. William Arnold be elected secretary, which was confirmed unanimously.

The board then went into session, and the president requested the secretary to read the following notice which had been served on him by Messrs. Glover & Shepley, attorneys for certain stockholders of the Pacific Railroad:

To Charles P. Chouteau, president of the Pacific Railroad, and to the board of directors of said railroad.

GENTLEMEN: We are the owners of ten thousand shares of the capital stock of said railroad, and you are hereby called upon to defend and protect the said railroad and our interests therein. There was, on the 6th of June, 1876, a decree entered in the Circuit Court of the United States, for the Eastern District of Missouri, in the case of George E. Ketchum and others against the Pacific Railroad and others, brought to foreclose the third mortgage executed by said company as alleged, and there has been an attempted sale thereunder of said railroad.

The said decree and sale, and all proceedings in said cause are utterly null and void, the said Court having no jurisdiction of the cause.

If said decree and sale are permitted to stand, the said railroad and all our interest therein, will be utterly lost.

You have consented to such decree being entered, and without such consent, no such decree could have been entered.

And we now demand of you that you protect our interest, and the interest of all the stockholders of said road, by moving, in the name of said railroad, to set aside said decree and the sale made thereunder, because the same is utterly null and void. And in case you shall not so move, in the name of the said railroad, to set aside said decree and sale, we shall hold you, and each of you, personally liable to us, and each of us, for the consequences of allowing such decree to be entered by consent, and of refusing to move said Court to set aside said decree and sale for want of jurisdiction in the Court. And we do further demand of you, that you authorize us to use the name of said railroad company in making such motion to set aside the decree and sale aforesaid, and to dismiss said bill and proceedings for want of jurisdiction of said Court. And if you shall refuse or neglect to so authorize us, we now notify you, and each of you, that we will hold you, and each of you, liable for the consequences thereof.

(Signed) N. E. Cowdrey, Robert A. Cutting, Jr
Peter Marie, Frank N. Otis,
Jacob Cromwell, Geo. L. Kingsland,
Geo. R. Fearing.
By Glover & Shepley, their attorneys.

Considerable discussion was entered into on the above communication, each member of the board expressing his

opinion. Judge Baker, at great length, reviewed the whole matter in a legal point, and was opposed to any notice being taken of it. Mr. Ferguson then offered the following resolutions, which were read by the secretary, and adopted unanimously :

Resolved, that we now are, and at all times have been willing and ready to do all in our power to protect the interests of the stockolders of the Pacific Railroad as expressed in our answer on file in the United States Circuit Court.

Resolved, that the president of the company, C. P. Chouteau, Esq., be authorized to take such legal advice and other action in the premises, as to him shall seem proper, after obtaining the information as to the law and facts contemplated in the foregoing resolutions.

The president then submitted a draft of a letter which he had prepared in answer to Messrs. Glover & Shepley's communications. Its various points were discussed, and several amendments were made, which resulted in the following letter, which was unanimously approved of, and the secretary was instructed to prepare a full copy of it, to be signed by the president, and to forward the same to Messrs. Glover & Shepley, with a copy of the resolutions passed this day.

ST. LOUIS, October 7th, 1876.

Messrs. GLOVER & SHEPLEY, Attorneys for Stockholders, etc.

Gentlemen—In answer to your notice, just received, I beg to inclose copy of resolutions adopted by the board of directors of the Pacific Railroad at a special meeting held this morning, and also a copy of the opinion of the Receivers as to the value of the property.

The board of directors now are, and have been at all times, unanimous in their desire to do all in their power to protect the interest of the stockholders of the Company.

Learning that Mr. Cowdrey and other stockholders of the Company wished to defend, while we did not approve of their action, we, feeling that we could do them no possible wrong, asked in our answer to the bill of foreclosure that the stockholders might have leave to defend, and such leave was granted by the Court, and an answer and cross-bill were filed, by permission of the Court, by Mr. Akers, on behalf of himself and all other stockholders who might wish to join.

If Mr. Cowdrey and his associates are really sincere in their desire to defend the foreclosure, why did they refuse to join with Mr. Akers? or, rather, why did they voluntarily withdraw after joining with him in the defense?

We had supposed they had become satisfied that a defense would be useless.

This was our view of the matter, and we now ask you the following questions:

1st. If the receivers of the road, Messrs. Beach and Stephens, who have every facility for knowing the facts, are correct in their views as to the value of the property, can any good result from a re-opening of the litigation?

2d. Are not the directors of the company estopped from assailing the validity of the third mortgage bonds, by the action of the stockholders in July, 1875, which authorized by an almost unanimous vote, the issuing of those bonds?

Again, assuring you of the willingness of the directors to do all in their power to protect any real interests of the stockholders,

I am, very respectfully,

(Signed) CHAS. P. CHOUTEAU, President.

There being no further business before the board the meeting was declared adjourned.

WM. ARNOLD, Secretary.

STATE OF MISSOURI, }
CITY OF ST. LOUIS, } ss.

Personally appeared before me, John P. Ellis, a notary public in and for said city and State, William Arnold, who is personally known to me, who on oath, says he was duly elected secretary of the Pacific Railroad by the board of directors, on October 7th, 1876; that he has never resigned, or been removed from said office; that the record book of the proceedings of said board of Directors has been in his possession ever since the said October 7th, 1876; and that the foregoing is a true and correct transcript from said records.

(Signed) WM. ARNOLD.

STATE OF MISSOURI, }
CITY OF ST. LOUIS, }

Subscribed and sworn to before me this 12th day of December, 1879. JOHN P. ELLIS,

[SEAL.] *Notary Public.*

Commission expires May 8th, 1881.

Supreme Court of the United States.

No. 242.

PACIFIC RAILROAD OF MISSOURI, Appellant,

vs.

KETCHAM AND OTHERS.

Points submitted by Mr. EDMUNDS, Counsel for Ketcham et al., in Support of the Motion to Dismiss the Appeal.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

No. 242.

PACIFIC RAILROAD OF MISSOURI, APPELLANT,

vs.

KETCHAM AND OTHERS.

Points submitted by Mr. Edmunds, Counsel for Ketcham et al., in Support of the Motion to Dismiss the Appeal.

STATEMENT.

The case in the Circuit Court in Missouri was a bill to foreclose a railroad mortgage. The corporation making the mortgage was a corporation of the State of Missouri. The whole property and effects covered by the mortgage were located in that State.

The plaintiff sues in his character as a bondholder under the mortgage in question. His bill states—

FIRST.

The parties he makes and the legal existence of the corporation.

SECOND.

The making of a mortgage by the company to Murdock and others on the 15th July, 1868, of the main line of the company, to secure the payment of $7,000,000 of bonds, and that nothing is overdue in respect thereto.

THIRD.

The execution of a second mortgage July 1, 1871, by the company to Morgan, of the same property, to secure the payment of $3,000,000 of bonds, and that nothing is overdue in respect thereto.

FOURTH.

The execution to Lackland of a mortgage April 19, 1872, of certain lots of real estate therein described, to secure the payment of $800,000 of bonds, and that nothing is overdue thereon.

FIFTH.

The construction by the company of a branch road, and the execution to Seligman and Baker October 1, 1873, of a mortgage thereof to secure the payment of $500,000, and that nothing is overdue thereon. (Record, pp. 1–5.)

SIXTH.

That the company, on the 10th July, 1875, executed the mortgage sought to be foreclosed in this case, to Vail and Fish, as trustees, covering all the property mentioned in the four mortgages above named, and setting out a fresh description of the same, to secure the payment of $4,000,000 of bonds, dated July 10, 1875, payable twenty (20) years after date to bearer, the interest, at 7 per cent., payable semi-annually. (F. 10, 11.)

SEVENTH.

That the payment of these bonds was guaranteed by the Atlantic and Pacific Company, one of the defendants. (F. 12.)

EIGHTH.

That this mortgage contained the special clause, that if the company failed to pay the interest for six months after any should become due and be demanded, the trustees were authorized and required, on the written request of the holders of $500,000 of the bonds, to sell the whole property and apply the net proceeds to the payment *pro rata* of all the bonds secured by the mortgage. (F. 12, 13.)

NINTH.

That the mortgage recited, as the fact was, that the company had then outstanding $1,500,000 of "income bonds," dated September 2, 1872, payable in twenty years, semi-annual interest at 7 per cent., and that the company had also outstanding $2,000,000 of "improvement bonds," dated December 15, 1874, payable in 1889, at 7 per cent. interest semi-annually, and that both said debts were not secured by mortgage, but were chargeable against the earnings of the line. (F. 13.)

TENTH.

That the mortgage in question provided for using the bonds secured by it to the extent necessary to take up the $3,500,000 of bonds last mentioned, and the balance to be used in raising additional sums for the permanent improvement of the road. (F. 13.)

ELEVENTH.

That the entire amount of these mortgage bonds was issued by the company accordingly, and the necessary number placed in the hands of the trustees for exchange for the outstanding income and improvement bonds. (F. 14.)

TWELFTH.

That about $2,000,000 of the bonds had been so exchanged, and that $300,000 of the mortgage bonds had been negotiated by the company, and that all of the same were outstanding and unpaid. (F. 14.)

THIRTEENTH.

That the interest on these mortgage bonds falling due November 1, 1875, was overdue and in default, although the same had been duly demanded by the orator as holder of many of said bonds and coupons, according to the provisions of the coupons and of the mortgage. (F. 14.)

FOURTEENTH.

That all of the mortgages before named had been lawfully recorded, and that no actions had been commenced in regard to any of them. (F. 14.)

FIFTEENTH.

The bill then states the location and relation of the lines of the mortgagor company and of the Atlantic and Pacific Company, the guarantor of these bonds, and that the Atlantic and Pacific in 1872 became the lessee of all the line and operations of the mortgagor company, and has been since in possession thereof, and that the interests of all concerned required a joint operation of the two lines. (F. 14–16.)

SIXTEENTH.

That the Atlantic and Pacific was bound by the lease to pay the interest upon the mortgages executed prior to the lease; also certain dividends, some of which was in default, to the lessor's stockholders. (F. 16.)

SEVENTEENTH.

That pursuant to the lease the Atlantic and Pacific had issued obligations in the name of the mortgagor, for which the mortgagor was liable. (F. 17.)

EIGHTEENTH.

That the Atlantic and Pacific was in default in respect of the payments on various mortgages of its own, and embarrassed by very large floating debts, in respect of which it was in default and was being sued thereon. (F. 17.)

NINETEENTH.

That large sums of money were due for taxes, for which both companies were responsible. (F. 17.)

TWENTIETH.

That the mortgagor was without means to meet its engagements, and that its paper had gone to protest. (F. 17.)

TWENTY-FIRST.

That the Atlantic and Pacific Company was in the same condition (F. 17); that there was great danger that the property covered by this mortgage would be seized by the general creditors of the company. (F. 17.)

TWENTY-SECOND.

That the property was good security for the first two mortgages issued, but that the property was not good security for the debt secured by this mortgage, and that a receiver ought to be appointed. (F. 17, 18.)

TWENTY-THIRD.

That a foreclosure suit had been brought on a $6,000,000 mortgage of the Atlantic and Pacific Company, and application made for the appointment of a receiver of all its property and assets, including its leasehold property obtained as before stated. (F. 18.)

TWENTY-FOURTH.

That in this state of things the orator, on behalf of himself and the other bondholders, had applied to Vail and Fish, their trustees, to take proceedings to foreclose and protect their interests. That no proceedings have been taken, on account of a doubt by the trustees whether they had a right to institute such proceedings until the defaulted interest should have been overdue for six months, and that in consequence of this non-action by the trustees, and the danger to the interests of the bondholders, the orator brings this suit in his own behalf, and that of all his co-bondholders, and he makes Vail and Fish parties defendants. (F. 18.)

TWENTY-FIFTH.

The bill then makes sundry special prayers, and has the usual prayer for general relief and for a subpœna. (F. 19–21.)

TWENTY-SIXTH.

Service was made on the defendants found in Missouri, and the others voluntarily appeared in the course of the proceedings.

TWENTY-SEVENTH.

On the 8th of January, 1876, one Akers, claiming to be a stockholder in the Pacific Railroad, mortgagor, filed a petition in this cause, claiming that the bill was filed by

consent of the officers of the railroad company, and that they did not intend to resist the foreclosure or make any defense; that he never consented to the issuing of the mortgage, and that the consent of the other stockholders was obtained by fraud, (F. 27,) and asking to be admitted to defend.

TWENTY-EIGHTH.

On the 7th of February, 1876, Akers, jointly with the county of St. Louis, by leave of court, filed an answer and cross-bill. (F. 27.) This is set out, as amended, in folios 45 to 66.

TWENTY-NINTH.

On the same 7th of February, 1876, the Pacific Railroad, mortgagor, filed its answer by its attorney and secretary, and under the seal of the corporation, admitting all the material statements in the bill, but saying "that it is informed that a portion of said stockholders claim that they [the bonds] are fraudulent and void, and that the directors of this defendant were guilty of fraud in issuing the same," and asking "this honorable court to permit [misprinted "*prevent*" in Record] any of the stockholders aforesaid to become a party defendant to this suit upon a proper showing, and make such defense in the premises as they may see proper." (F. 28 to 31.)

THIRTIETH.

On the 16th of February, 1876, Garrison, Seligman, and Pierce, bondholders, petitioned to be made co-plaintiffs with Ketcham.

THIRTY-FIRST.

On the 25th March, 1876, Marie, Otis, R. L. Cutting, J. D. Cutting, and Fearing, claiming to be stockholders in

the company, petitioned to be made made parties defendant and to stand on the answer and cross-bill of Akers. This petition was never brought to a hearing or acted upon. (F. 35. See *ex parte* Cutting, 94 U. S., 14.)

THIRTY-SECOND.

On the 3d April, 1876, Seligman and Pierce had leave to join as complainants with Ketcham, and on the same day a receiver was appointed. (F. 36 to 44.)

THIRTY-THIRD.

On the 25th April, 1876, the answer and cross-bill of Akers and the county of St. Louis were filed as amended, presenting all sorts of questions as to taxes, liens, stockholders' rights, and the circumstances under which the mortgages had been issued and the business of the companies carried on. (F. 45 to 66.)

THIRTY-FOURTH.

On the 5th June, 1876, sundry of the defendants answered, admitting the bill. (F. 67 to 69.)

THIRTY-FIFTH.

On the 6th June, 1876, Vail and Fish, the trustees, answered the bill, admitting its allegations, and submitting the interests of the bondholders to the protection and judgment of the court. (F. 17.)

THIRTY-SIXTH.

On the same day Akers and the county of St. Louis, on leave, dismissed their cross-bill and withdrew their answer. (F. 71.)

THIRTY-SEVENTH.

On the same day, all the parties, by their solicitors, being before the court, the same came on to be heard upon the bill, answers, and exhibits, and a decree was entered stating the substantial history of the mortgages and debts in question; that there had been a default of interest on the 1st of November, 1875, after due demand, &c., and that "*by the consent of all the parties to this suit, through their solicitors of record, thereupon and in consideration thereof, it is ordered, adjudged, and decreed as follows, to wit.*" The decree then directs a sale of the property covered by the mortgage, on sixty days' notice in sundry newspapers. (F. 77.)

THIRTY-EIGHTH.

The property was sold on the 6th of September, 1876, to James Baker, a trustee under one of the prior mortgages, and who was and had been the solicitor of the defendant company. (F. 99.)

THIRTY-NINTH.

On the 18th of September, 1876, the orator moved to confirm the sale. (F. 80.)

FORTIETH.

On the 19th September, 1876, Cowdrey, Cutting, Marie, Otis, Cromwell, Kingsland, and Fearing filed a joint petition for liberty to intervene, set aside the decree, &c., alleging that they were stockholders and the agents of other stockholders, claiming that the earnings of the lines had been so and so; that they never knew of a foreclosure when the principal was not due and the earnings were so large; that sundry payments by the receivers had been improvident, and that the capital stock of the Pacific Company amounted to about $7,000,000, largely held by widows and orphans, who wished

this court to protect them against the conspiracies of Garrison and others; that the answer and cross-bill of Akers had been withdrawn without notice to them or to the other stockholders; that the road had been purchased at the master's sale by Pierce for Baker, the defendant's solicitor; that Pierce is charged in a bill of Cowdrey, pending in court, in respect to these same matters, with conspiracy and misconduct; that at the annual meeting of the stockholders on the 27th March, 1876, the directors were requested to employ Glover and Shepley to aid in defending the company in the foreclosure suits and in proceedings in bankruptcy pending against them; that the directors, in bad faith, continued to employ Baker, who consented to the decree; that the decree was erroneous, because it allowed all the mortgage bondholders to participate in the benefit of the purchase, if the property should be bought by any of the bondholders; and because it did not fix any specific amount as due to the complainants except by implication; and because it did not find the necessary facts; and because it gives no time to redeem; and because the property was sold within sixty days; and because the costs were not taxed; and because some of the holders have no title to their bonds. And stating that the petitioners on the 2d February procured Cowdrey to institute a suit in equity in the same court against these same parties, and that he did so; that the same is now pending, and alleges fraud and collusion in the issue of the bonds and various other circumstances and facts, and prays a cancellation of the whole. (F. 89–93.)

FORTY-FIRST.

On the 3d of October, upon full hearing, this petition was denied. (F. 94.)

FORTY-SECOND.

On the 6th of October, 1876, the sale of the property was confirmed. (F. 81.)

FORTY-THIRD.

On the 6th of February, 1877, Glover and Shepley, in the name of the Pacific Railroad, presented to Mr. Justice Miller a petition for an appeal, based on certain alleged proceedings stated in exhibit A, attached to the petition. These proceedings purport to be those of an adjourned meeting of stockholders held December 14, 1876, and recite certain alleged powers of the stockholders at an annual meeting, and that the directors have allowed their counsel to confess judgment and decree in this case, and that under it Baker has purchased the road; that the directors neglected to defend the suit, or to take an appeal, or to allow the stockholders to do either, and resolved in "an adjourned annual meeting, assembled this 14th day of December, 1876," that Cutting, Fearing, Rankin, Marie, and Cowdrey, or a majority, be "appointed a special committee, and the agents of said Pacific Railroad, and its stockholders, with full power and authority to commence, prosecute, and defend all and each of any suits at law or in equity, as they or a majority of them shall think for the interests of said railroad, including the right to take appeals, bring a writ of error, or make motions in or for a review of any suit heretofore commenced against said railroad," and revoking any authority given by the directors to use the name of the Pacific Railroad in the Ketcham suit, and removing Baker as attorney, &c., and appointing Glover and Shepley in his place, and authorizing the committee to appoint a transfer agent to take possession of the stock-books of the company and to fill any vacancies in their number. The appeal was allowed. (F. 113–120.)

In respect of the right of Cowdrey, &c., to use the company name on which to take an appeal, as claimed in their application to Mr. Justice Miller, the following proofs are submitted, and appear appended to the motion to dismiss and as a supplement thereto:

First.

Affidavit of Stephens, chairman stockholders' annual meeting, held on 27th March, 1876, stating that the annual meeting having concluded its business, it was resolved "that when this meeting adjourns, it adjourn to meet at the call of the chairman on the request of ten thousand shares of stock"; that in the next fall Cowdrey, claiming to represent ten thousand shares of stock, wrote requesting him to call a meeting of the stockholders, to be held on the 14th of December, 1875, at St. Louis, which he did; that he (Stephens) was not present at the same. (Motion, p. 14.)

Second.

The meeting and organization of the newly-elected board of directors on the 28th of March, 1876, showing that Dearborn, and not Porter, was the secretary of the company. (Motion, pp. 15, 16.)

Third.

Exhibits showing suit by Marie, Otis, Fearing, Cowdrey, Cutting, and Cromwell against Garrison, and showing that the parties now attempting to use the name of the company were fully cognizant of and privy to all the proceedings in this cause, and that they were consenting and agreeing to the decree in consideration of the agreement of Garrison, a large bondholder, to let them into the stock of any new company that should be formed, on certain terms. (Motion, pp. 18–41.)

Fourth.

The affidavits of Baker, showing that in filing the answer and consenting to the decree he acted by direction of the board of directors; that at the annual stockholders' meeting Cowdrey and his present associates informed him

that they had made satisfactory arrangements with Garrison, and wished to have the decree of foreclosure at the earliest possible time; that several of them were in court from time to time during the progress of the cause, and that Cowdrey himself objected to Akers being heard, claiming to be the owner of the stock that Akers stood upon; that Mr. Shepley, one of the counsel obtaining the appeal, was their attorney, and assisted in settling the form of the decree and agreed to the same; that the directors and the stockholders both understood and consented to the making of the decree; that he owned no securities of the Pacific Railway, and was in no way personally adversely interested; that the adverse interests at the sale were between two classes of the same bondholders, holding together, substantially all the bonds; that he was asked by the bondholders' committee to allow the property to be struck off in his name as a matter of convenience and confidence; that Pierce, for one party of the bondholders, was the bidder, and when it was struck off, in answer to the inquiry of the master, stated the affiant's name as that of the purchaser; that he had no personal interest in the matter whatever. (Motion, pp. 42 to 45; Supplement, pp. 2 and 3.)

Fifth.

Affidavit of Fish, corroborating Baker as to the circumstances of the sale, and showing the proceedings of the great body of bondholders in trying to protect their interests. (Supplement, pp. 4 to 15.)

Sixth.

Proceedings of the board of directors on the 7th of October, showing Cowdrey and his associates to have fallen out with Garrison, or intending a further levy upon him, complaining that the board of directors consented to the

decree, and demanding that they move to set it aside, and threatening all sorts of consequences, and showing the reply of the directors to these complaints.

The foregoing is believed to be a perfectly accurate abstract of the history and proceedings in this affair.

The statements contained in the briefs for the appellant are in many respects erroneous, and particularly in stating as facts appearing in the record what are merely the allegations, unsupported by proof, in the answer and cross-bill of Akers and St. Louis county, which were withdrawn and dismissed, and which properly form no part of the present record, and in assuming and stating as facts appearing the unsupported allegations of Cowdrey and others in their petitions.

POINTS.

I.

There is no assignment of errors annexed to and returned with the appeal, as required by sections 997 and 1012 of the Revised Statutes.

II.

The decree was entered by consent of all parties, including the alleged appellant. From such a decree no ap-

peal can be taken, for the reason that error cannot be alleged in respect of any proceedings to which the party has assented. (Cole *v.* Scott, 14 Jurist, 25; Carew *v.* Cooper, 12 W. R., 767; Ringgold's case, 1 Bland, 5; Atkinson *v.* Manks, 1 Cow., 709; 2 Dan. Ch. Pr., pp. 973, 974, (4th ed.); see cases cited in Mr. Day's brief.)

Cases of default and consequent judgments or decrees *pro confesso* are clearly distinguishable. In such cases it may well be considered that nothing is admitted but the facts stated against the defendants, and that he leaves it to the court to proceed thereon according to law.

III.

The authority of a solicitor to consent cannot be inquired into or impeached on appeal, for the appeal must be solely on matters appearing in the record. (Mole *v.* Smith, 1 J. & W., 653; Hobler's case, 8 Beavan, 101.)

Redress for want of authority in such case, or collusion, is to be obtained by motion upon proofs and counter-proofs, or by bill on which issue can be made and proof regularly obtained. Every case cited on the other side that has any bearing on the subject is of this character.

IV.

Appeals from consent decrees are irregular and dismissable. (Toder *v.* Sansam, 1 Bro. P. C., 468.)

V.

The statute concerning appeals does not change these perfectly-settled rules. The statute is general, and, like all such statutes, must be construed according to the principles of common sense, and its application limited to those persons who are entitled to complain of the action of the court.

A literal construction of the section relied on would authorize any stranger to remove a cause by appeal, or a party whose bill had been dismissed on his own motion, or who had filed a release of all errors, to do the same. Such a transaction is absurd, and is believed to be in opposition to every case (with one exception) that has ever been decided on the question.

The Supreme Court is, by statute, expressly authorized to make rules regulating proceedings in equity, under which

authority it is provided that the rules of English chancery practice shall be a guide in ours.

The English practice has always been in conformity with the propositions before stated; and there is no exception in such cases, even in respect to jurisdiction. The essential principle is that the party consenting has no right to bring up and open the record to the inspection of this court for any purpose whatever. If the decree below be void it will stay void, and the consent of parties in that case will only be a mere contract between them. If it be merely voidable, and the case be capable of an adjustment securing the jurisdiction, the consenting party is estopped from complaint as in the case of any other error. There can be no appellate jurisdiction in such a case, for the court below has made no *decision* in the full judicial sense. A trial here would be an *original* trial.

Corning *v.* Winslow, 15 How., 451, (precisely in point.)

Murphy *v.* Ins. Co., 25 Wend., 249; 14 Jurist, 339.

VI.

The solicitor of a corporation or an actual person, must be presumed to act within the authority of his instructions; and whether his instructions warrant the consent he gives is a question of fact which cannot properly appear in the record, and which does not appear in the record proper of

this cause, and which, if any question arise, must be the subject of an issue and trial in proceeding properly constituted.

VII.

But to meet the extrinsic allegations of the persons attempting to appeal, it is abundantly shown by the proceedings and proofs hereinbefore referred to that Baker, the solicitor, was fully authorized to consent to the decree as he did. There is no shadow of evidence to the contrary.

VIII.

It appears from the papers submitted to Mr. Justice Miller that the right of Glover and Shepley to use the name of the company in the appeal rests solely upon the employment of certain stockholders, and as the right of solicitors to appear for parties in court is never in the record of pleadings or issues between them, but is external to the record, Glover and Shepley felt it a duty to exhibit to Justice Miller precisely their authority and who were their clients. The authority of Cowdrey and others, their clients, is therefore open to opposition. (Lord *v.* Veazie, 8 How., 251; Mole *v.* Smith, 1 J. & W., 653, and note.)

Their authority depends upon the true construction of the act of the General Assembly of Missouri of March 1, 1851, to be found on pages 5, 6, and 7 of the motion to dismiss. That act requires an annual meeting of the stock-

holders on the last Monday of March in each year, on a certain notice, for the election of a board of directors, &c. It provides that the directors shall choose one of their number as president, and that "the said president and directors shall conduct and manage the affairs and business of the said company until the last Monday in March then next ensuing and until others are chosen, and may make and establish such by-laws, rules, orders, and regulations, not inconsistent with law, as to them may seem needful." Thus it will be seen that an annual meeting of stockholders can be held and exist on no other day than the last Monday of March, though probably that day might be considered as continuing over into succeeding days so long as there should be a continuous meeting. The second section of the act provides that "at every annual meeting the said stockholders shall have power to make, alter, or repeal, by a majority of the votes given, any or all such by-laws, rules, orders, and regulations as aforesaid, and do and perform every other corporate act authorized by their charter." It also provides for special meetings for particular objects stated in the notice of call by the directors. If the meeting of Cowdrey and his associates, therefore, was a meeting at all, it was not a special meeting, for it was not called by the president and directors on a notice stating objects, &c. Special meetings were by the same section authorized to adjourn from day to day; the annual meeting was not. As shown in the statement, the annual meeting was regularly held and its business completed on the day named in the law, and that no step was taken to change any of the orders or proceedings of the directors, or to do any other corporate act other than such election. That it was then voted to adjourn, not even to any fixed date or place, but to meet on the call of the chairman on the application of ten thousand shares of stock.

It appears impossible to maintain that an assemblage held nearly nine months afterwards, even if the contin-

gency had happened, which is not proven, can be the annual meeting provided for in the law. (Angell & Ames on Corp., sec. 84.)

Again, the authority to perform every other corporate act authorized by their charter cannot, it is submitted, be construed to mean that the stockholders may elect a new board of directors, displacing those they had elected within the year, or choose a president of the company, or take the conduct and management of the affairs of the company, which the preceding section explicitly confides to the directors, out of their charge, and turn it over to a committee. The true meaning of the phrase must be that the stockholders, at an annual meeting, may perform all the corporate acts confided by their charter to them, and may also change the laws and rules established by the directors, and nothing more. It follows that Cowdrey and his associates, the clients of Glover and Shepley, have no authority whatever to use the name of the corporation for this purpose, and therefore that the appeal was improvidently allowed and should be dismissed.

IX.

But Cowdrey and his associates, in their character as stockholders, are estopped from prosecuting this appeal or from alleging error in the decree, because it appears from the proceedings and documents in the record, and the evidence of the transactions external to it, that they were

all fully informed, advising, negotiating, trading, and consenting parties to the whole transaction by which this corporation, utterly swamped in debts and complications, in actual bankruptcy, its stock absolutely worthless, was to be wound up, and out of the wreck its bondholding creditors were to endeavor to save something of their debts. Persons so situated can have no claim to use the name of the corporation to seek a revenge for what they consider a breach of the promises of some of the parties to the transaction. (Crawshay *v.* Soutter, 6 Wall., 739.)

X.

Inasmuch as the sale was in precise conformity with the decree, no error can be alleged in respect of the order confirming the sale, unless the original decree be now open to review.

XI.

The only point in the sale and its confirmation not covered by the decree is that Baker was, in a technical sense, the purchaser.

As to this we maintain:

a. The record proper does not show that he was acting outside of his duty as solicitor for the company. For aught that appears in the report of the sale and in the order of confirmation, he was acting under instructions from the whole body of the corporation.

b. The record shows that Baker was, and had been all the time, a trustee under a mortgage made by the corporation itself covering a part of the property. As such, he had a right according to the interests of his constituents to act independently of the wishes of the corporation in his character as such trustee, and to make such arrangements with other mortgagees as he deemed most beneficial to his trust.

c. If the evidence be looked into, it is demonstrated that Baker was not a bidder, but that at the end of the successful bid of Pierce he was named as the purchaser solely as a matter of convenience and personal confidence for the time being, and without having personally any direct or remote interest in the affair at all.

d. If the question had come up on the motion to confirm the sale, there would have been no ground to refuse confirmation without its being shown by the opponents that the use of Baker's name was or might be in some way prejudicial to the corporation. No such showing was made, and the only way of trying the question afterwards is by an independent proceeding, or an appeal to the discretion of the court below.

XII.

If the record were open for review, there was jurisdiction and no error.

a. As to jurisdiction, the bill does not put the trustees in an attitude of controversy with the bondholders; and the answer of the trustees explicitly puts them in harmony with the interests of the bondholders and the objects of the suit; so that the point against the jurisdiction is reduced simply to the fact that they stand on paper as defendants instead of co-plaintiffs. Both the Constitution and the act of 1875 were directed to matters of substance, and not of mere form.

b. The suit was not premature, and was properly constituted on the merits. The six months' limitation of the power of trustees after default mentioned in the mortgage, applied solely to proceedings *in pais* of the trustees. The equitable rights of bondholders to invoke judicial redress were in no manner interfered with. Before the decree was rendered the default had continued more than six months,

and it was the right and the duty of the court in that case to order a sale of the whole property for the payment of the whole debt, for the whole debt was then in default, according to the terms of the mortgage.

c. In the foregoing state of the case, however it might have been in the case of a strict foreclosure, the decree for sale, without first limiting a time within which the respondents should redeem, was perfectly correct in point of law, for it followed the provisions of the mortgage, and it was in accordance with the laws of Missouri. At any time before the sale, the debtor might have brought all that it claimed to be due into court and applied for a stay of proceedings, and protected its interests, if it had any to protect.

GEO. F. EDMUNDS,
Of Counsel.

In Supreme Court of

UNITED STATES.

No. 242.

THE PACIFIC RAILROAD,

Appellant.

vs.

GEORGE E. KETCHUM

and Others,

Respondents.

Affidavits and Documents in support of motion to dismiss appeal.

New York:
Rufus Adams, Printer and Stationer, 12 Pine Street.

IN THE

Supreme Court of the United States.

No. 242.

OCTOBER TERM, 1878.

THE PACIFIC RAILROAD,
Appellant,

vs.

GEORGE E. KETCHUM, CORNELIUS K. GARRISON, JAMES SELIGMAN, THOMAS W. PIERCE, THE ATLANTIC AND PACIFIC RAILROAD COMPANY, HENRY F. VAIL and JAMES D. FISH, Trustees, JAMES BAKER, THE MISSOURI PACIFIC RAILWAY CO., and THE NATIONAL TRUST CO., OF NEW YORK,
Respondents.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

To N. A. COWDREY,
Attorney for the said Appellant.

You are hereby notified that the affidavit of James Baker and of Clinton B. Fisk, and exhibit therein referred to, a copy of which is hereto annexed, will be filed in the Supreme Court, and will be used in support of the pending motion to dismiss the appeal of which you have heretofore been notified, and which motion will come up for hearing on Monday, January 26, 1880, or sooner if the said cause is sooner reached for final hearing on the appeal.

January 5th, 1880. JAMES O. BROADHEAD,
Attorney for the Respondents.

I admit service upon me this 5th day of January, A. D., 1880, of the above notice and a copy of the affidavits and exhibits therein referred to

January 5th, 1880. N. A. COWDREY,
Solicitor for Pacific Railroad.

[SUPPLEMENTAL AFFIDAVIT OF JAMES BAKER.]

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 242.

THE PACIFIC RAILROAD,
vs.
GEORGE E. KETCHUM, CORNELIUS K. GARRISON, THOMAS W. PIERCE, JAMES SELIGMAN, THE ATLANTIC AND PACIFIC RAILROAD, HENRY E. VAIL and JAMES D. FISH, Trustees, JAMES BAKER, THE MISSOURI PACIFIC RAILWAY CO. AND THE NATIONAL TRUST CO. OF NEW YORK.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

I, James Baker, being duly sworn, do depose and say, that at the request of the counsel for the respondents, I recently made the affidavit in this cause, referred to in the motion of the respondents to dismiss the appeal. In that affidavit I stated that at the sale in September, 1876, under the decree, C. K. Garrison and myself, I being then the representative of a majority of the bondholders, became competing and adversary bidders for the property; several bids were made by each of us and the property was struck off to me as the highest bidder, and the sale was afterwards confirmed without objection, &c. The facts in this respect, more fully stated, are as follows: I filed the answer of the Pacific Railroad in the Circuit Court under the circumstances stated in my former affidavit.

Neither at the commencement of said foreclosure suit, nor during its pendency, nor at the time of the decree or the sale under the decree, was I the owner of any mortgage bonds or securities upon the Pacific Railroad, of any kind, nor in any way adversely interested to the said Railroad. I had no employment by the Bondholders or the Trustees in the mortgage, or by any person for them. Referring to the annexed Exhibit for details, I may add that one adverse interest in the contest among the Bondholders was represented by Mr. C. K. Garrison, who was understood to own or control about eighteen hundred bonds, amounting to $1,800,000, or thereabouts; the other adverse interest was represented by the Bondholders' Committee, named in the annexed Exhibit, and which represented about

twenty-one hundred bonds, amounting to about $2,176,000 ; the two representing substantially the mortgage debt. The exact amounts are stated in the annexed Exhibit. Shortly before the sale by the Master under the decree, say about two days before such sale, I was asked by the said Bondholders' Committee to permit the property covered by the mortgage, and which they contemplated purchasing under the decree, to be purchased in my name, as their Trustee, to which I consented. At the sale, the Garrison interest and the interest represented by the said Committee of Bondholders, became competing and adversary bidders, as stated in my former affidavit. Several bids were made by each. Mr. Andrew Pierce, for the Committee of Bondholders, finally made a bid of $3,000,000, which was the highest offer, and when the Master inquired who was the purchaser, the answer was James Baker, (the affiant), and it was so declared. The use of my name was wholly and entirely nominal. I was a dry, naked Trustee ; and the reason, and only reason, why I was selected as such Trustee, as I then understood, and still believe, was that all of the Bondholders represented by the said Committee had confidence in me. Further Deponent saith not.

JAMES BAKER.

STATE OF NEW YORK, }
County of New York. } ss.

[SEAL.] Subscribed and sworn to before me this 5th day of January, A.D. 1880. Witness my hand and seal official, hereto set the day above written.

JAMES J. THORNLEY, JR.,
Notary Public, Kings County, New York.

[AFFIDAVIT OF CLINTON B. FISK.]

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, No. 242.

THE PACIFIC RAILROAD,
Appellant.
vs.
GEORGE E. KETHUM AND OTHERS,
Respondents.

On Appeal from the Circuit Court of the United States, for the Eastern District of Missouri.

I, CLINTON B. FISK, being duly sworn do depose and say, that on July 26th, 1876, I was appointed Secretary of the Meeting of the Third Mortgage Bondholders of the Pacific Railroad, (of Missouri), which mortgage was being then foreclosed in the U. S. Circuit Court for the Eastern District of Missouri: that I kept a record of the proceedings of the said Bondholders, and of the Bondholders' Committee appointed by them; that the Exhibit hereto attached is a full, true and accurate transcript from the record kept by me: that the original is in my handwriting; that the entries were truly made at the time of the transactions recorded: and are correctly set forth in the annexed Exhibit, entitled, "Proceedings pertaining to the foreclosure, purchase and re-organization of the Pacific Railroad of Missouri, under its Third Mortgage Bonds," and in the circular issued to the said bondholders, and entitled in said Exhibit as the "Report of the Committee on purchase of the Pacific Railroad, (of Missouri), and organization of successor Company:" I was present at all of the said meetings, and know that the matters therein recorded, actually took place. The scheme of re-organization as embodied in said Circular Report was actually consummated: the uew Company (The Missouri Pacific Railway Company), was organized, and new bonds and stock issued.

I have read the foregoing affidavit of James Baker, and all of the statements therein made are true, as I verily believe. I know of my own knowledge that said Baker was asked to allow his name to be used by the Bondholders' Committee, in case they should purchase the Road under the decree, and he consented. Baker did not own any Bonds, and acted merely to accommodate the Bondholders' Committee. There were several bids made at the sale, (at

which I was present), by Mr. Garrison, on the one side, and on behalf of the Bondholders' Committee on the other, and the property was finally sold to the Bondholders' Committee. The bid was made by Mr. Andrew Pierce, as their representative, but Mr. Baker was announced to the Master as the purchaser, and it was so entered ; but in this matter Baker was simply the representative and Trustee of the Bondholders. Further deponent saith not.

CLINTON B. FISK.

STATE OF NEW YORK, }
City and County of New York. } SS.

[SEAL.] Subscribed and sworn to before me this 5th day of January, A. D. 1880. Witness my hand and official seal, hereto set, the day above written.

JAMES J. THORNLEY, JR.,
Notary Public, Kings County, New York.

The following is the Exhibit referred to in the foregoing affidavits of James Baker and Clinton B. Fisk.

(Exhibit Referred to in Preceding Affidavits.)

PROCEEDINGS

PERTAINING TO

FORECLOSURE PURCHASE

—AND—

RE-ORGANIZATION

OF

THE PACIFIC RAILROAD OF MISSOURI,

UNDER ITS

THIRD MORTGAGE BONDS.

Pursuant to notice, the Third Mortgage Bondholders of the Pacific Railroad (of Missouri) convened at the office of the Atlantic & Pacific Railroad Company, No. 3 Broad Street, New York, on the 26th day of July, 1876.

D. R. Mangam was called to the Chair, and W. H. Coffin was chosen Secretary. Joseph Seligman stated the object of the meeting, and after discussion, the following resolution was adopted unanimously, on motion of Clinton B. Fisk :

RESOLVED, That a Committee, consisting of Joseph Seligman, D. R. Mangum, T. T. Buckley, Andrew Pierce, and George F. Stone, be appointed, with full power to purchase in behalf of the Bondholders who may signify their approval of this resolution, and at such price as they may deem proper, the said Pacific Railroad (of Missouri), and all the property thereto belonging at the sale thereof, to be made under a decree of the Circuit Court of the United States, on the sixth day of September, 1876 to satisfy said Mortgage. And the said Committee are hereby authorized to enter into such financial engagements for the completion of such purchase, and to organize a new Corporation, in our behalf, and to do all things needful for the protection of our interests, under the foreclosure proceedings now in progress.

The meeting adjourded.

W. H. COFFIN,
Secretary.

COMMITTEE'S PROCEEDINGS.

The Committee appointed by the foregoing resolution convened at the office of the Atlantic & Pacific Railroad Company, on July 26th, 1876. There were present:

D. R. MANGUM, JOSEPH SELIGMAN.
ANDREW PEIRCE, and GEORGE F. STONE.

The Committee organized by selecting D. R. Mangum, Chairman, and Clinton B. Fisk, Secretary.

The Secretary was instructed to prepare a paper for the signatures of Bondholders, pledging their approval of the action of the Bondholders' meeting and co-operation with the Committee. The Committee adjourned to meet on July 27th, at one o'clock, P. M.

CLINTON B. FISK, Secretary.

MEETING JULY 27TH.

The Committee convened pursuant to adjournment, with members present as follows: D. R. Mangum, Joseph Seligman, and George F. Stone. The Secretary submitted the following paper in compliance with the instructions of previous meeting.

PACIFIC RAILROAD (OF MISSOURI.)

Re-organization.

We, whose names are hereto subscribed, owners of the Third Mortgage Bonds of the Pacific Railroad (of Missouri), in the sums set opposite each our respective names, do hereby signify our approval of the resolution adopted at a meeting of said Third Mortgage Bondholders, held July 26th, 1876, to wit:

(See resolution in proceedings of Bondholders' meeting.)

We hereby agree, in furtherance of the purpose in the foregoing resolution expressed, to deposit, on receiving request from Committee so to do, with the National Trust Company in the City of New York, the amount of Bonds set opposite our respective names, or the evidence of ownership of same, subject to the order of said Committee for exchange into new Securities of the contemplated new Corporation.

NEW YORK, JULY 27th, 1876.

The foregoing paper was adopted as a proper form of compliance with the action of the Bondholders' meeting, and it was resolved to proceed immediately to the procurement of signatures to the same.

The Committee adjourned to meet on Tuesday, August 1st, at one o'clock, P. M.

CLINTON B. FISK, Secretary.

Meeting August 1st.

The Committee convened pursuant to adjournment. The entire Committee present. Minutes of former meeting were read and approved.

The Chairman reported the following subscriptions to the paper adopted at the last meeting:

D. R. Mangum,	$200,000
Andrew Pierce,	175,000
Joseph Seligman,	323,000
Uriel Crocker,	50,000
T. W. Pierce,	200,000
G. F. Stone,	60,000
Clinton B. Fisk, (16 B. B.)	67,000
Wm. H. Coffin,	40,000
J. P. Robinson,	10,000
James D. Fish,	116,000
Thos. T. Buckley,	36,000
Wm. H. Guion,	50,000
S. R. Comstock,	13,000
C. Littlefield,	13,000
Ozias Bailey,	26,000
Amos Paul,	14,000
F. L. Ridgley,	8,000
Charles Thurber,	7,000
Mrs. Olivia Bacon,	7,000
J. N. Pritchard,	5,000
Fred'k Billings,	50,000
A. B. Baylis,	12,000
J. L. Dearborn,	14,000
T. W. Shannon, Att'y,	12,000
Chas. F. Tag,	23,000
Henry F. Verhuven,	41,000
C. Bergen,	21,000
Wm. F. Buckley,	25,000
	$1,618,000

The Committee adjourned to meet at 12 o'clock noon, on August 2d.

Clinton B. Fisk,
Secretary.

The Committee convened at the office of the Atlantic and Pacific Railroad Company at No. 25 South Fourth Street, St. Louis, on September 5th. All the members present. The minutes of the last meeting were read and approved.

The sale of the Pacific Railroad under decree of Foreclosure on September 6th, and the purchase of the same by some party in behalf of the Committee, was the subject of discussion, and a purchase at reasonable price was unanimously agreed upon.

T. T. Buckley tendered his resignation as a member of the Committee, but his Associates unanimously declined to receive it.

Andrew Peirce was appointed a Committee of one to Sureties for the two hundred thousand dollars Bond, ($200,000) required by the Master in Chancery at the sale on the 6th inst.

The Committee adjourned to meet at the Lindell Hotel in room 203, at 8 o'clock, P. M., this instant.

CLINTON B. FISK,
Secretary.

LINDELL HOTEL, ST. LOUIS,

Sept. 5th, 1876.

The Committee met pursuant to adjournment. All the members present. After much deliberation it was, on motion of J. Seligman

RESOLVED: That the Committee of Bondholders, through their representative, will bid as high as Three millions three hundred thousand dollars ($3,300,000) for the Pacific Railroad and other property thereto belonging, at the sale of the same, under Decree of Foreclosure, on the sixth inst.

And it was on motion of G. F. Stone—

RESOLVED: That the Committee, on the part of the Bondholders, indemnify the individual Sureties who may sign the Bond of Indemnity required by the Master in Chancery.

It was found that the subscribers to the Bondholders agreement, under which the Committee were appointed, had been augmented since August 1st, as follows:

Subscriptions hitherto recorded,	$1,618,000
A. F. Beekman,	5,000
Chas. E. Harwood,	5,000
Israel Sheldon.	20,000
R. H. Lowry,	3,000
Oliver Ames,	45,000
James F. White,	43,000
F. B. Hayes.	46,500
Jacob Sleeper,	27,000
Isaac Richards' Estate,	31,000
E. N. Robinson,	7,000
E. N. Robinson,	15,000
W. S. Nichols & Co.,	5,000
W. M. Park,	10,000
Ford Cooper,	20,000
August Crane,	20,000
N. Wyckoff,	10,000
Austein,	1,000
Baker & Morrill,	35,000
T. Q. Owen,	10,000
D. R. Mangum, et al.,	200,000
	$2,176,000

The Committee adjourned to meet at call of the Chair:

CLINTON B. FISKE, Secretary.

NEW YORK, Sept. 21st. 1876

The Committee convened pursuant to the call of the Chairman, and after receiving the following report from D. R. Mangum, Chairman, it was voted that the members of the Committee affix their signatures to the same, in these records.

REPORT OF CHAIRMAN.

GENTLEMEN :

I beg leave to report that all the members of the Committee proceeded to St: Louis, to be present ot the sale of the Pacific Railroad (of Missouri), and other property thereto belonging, under decree of foreclosure, on the sixth instant.

The records of the proceedings of the Committee prior to the sale of the road, show the action of the Committee up to that date.

In accordance with the instructions of the Committee the property covered by the Third Mortgage was purchased in behalf of the subscribers to the bondholders agreement by Andrew Peirce in the name of James Baker for the sum of three millions of dollars.

After the sale and on the 8th inst. an arrangement was made with Commodore C. K. Garrison to combine the interests represented by himself with those represented by your Committee, and that a re-organization of the Company should be effected under the direction of Mr Garrison, and that all the bondholders in the combination should be protected impartially in the new issue of bonds and stocks. The details of the re-organization to be perfected and carried out by Mr. C. K. Garrison, and that he should have the entire control of the re-organization, and the future management of the Company and property.

The details of the re-organization, when agreed upon, will be specifically communicated to each subscriber to the Bondholders' agreement.

Signed,

D. R. MANGUM, Chairman.

We, the Members of the Committee on Purchase and Re-organization of the Pacific Railroad (of Missouri,) hereby approve of the foregoing report of the Chairman, and attest its correctness.

NEW YORK, SEPTEMBER 22d, 1876.

MANGUM.
PEIRCE.
SELIGMAN.
BUCKLEY.
STONE.

The Committee adjourned to meet on call of the Chairman.

CLINTON B. FISK, Secretary.

MEETING OCTOBER 14TH, 1876.

The Committee met pursuant to call of the Chairman—present, D. R. Mangum, Joseph Seligman and Andrew Peirce. The Chairman made verbal report of progress in the confirmation of the Sale (by the Court) of the Pacific Railroad and the plans for re-organization—after much deliberation it was, on motion of Joseph Seligman—

RESOLVED: That the Chairman of the Committee is hereby authorized to subscribe in behalf of the parties to the Bondholders' agreement for three hundred and ninety-nine thousand dollars of the Capital Stock of the Successor Company to the Pacific Railroad (of Missouri,) it being understood, that said Capital Stock shall be Eight hundred thousand dollars, and that the said subscription shall be paid at such times as may be designated by the Chairman.

The Committee then adjourned to meet on call of Chairman.

CLINTON B. FISK,
Secretary.

MEETING NOV. 8TH, 1876.

The Committee convened at the call of the Chairman, at the office of the Atlantic & Pacific Railroad Company, D. R. Mangum, J. Seligman and Andrew Pierce, present.

The Chairman made verbal report of the confirmation of the sale of the Missouri Pacific railroad to James Baker, and the conveyance thereof to the Missouri Pacific Railway Company of the subscription for $395,000 of the $800,000 capital stock of the new company, in behalf of the subscribers to the Bondholders' agreement. The Secretary was instructed to prepare a complete report of the proceedings of this Committee, together with a statement of settlement to be made with each subscriber, and to place said report and statement in the hands of all parties interested, forthwith. The Committee adjourned.

CLINTON B. FISK,
Secretary.

REPORT

OF THE

COMMITTEE ON PURCHASE OF THE PACIFIC RAILROAD

(OF MISSOURI,)

AND ORGANIZATION OF SUCCESSOR COMPANY.

To the Third Mortgage Bondholders
of the Pacific Railroad of Missouri:

The undersigned, a Committee chosen by the bondholders at a meeting held in the city of New York, on the 26th day of July last, and "appointed with full power to purchase, in behalf of the bond-"holders, and at such price as they may deem proper, the Pacific "Railroad (of Missouri), and all the property thereto belonging, at "the sale thereof, to be made under a decree of the Circuit Court of "the United States, on the sixth day of September, 1876, and to "enter into financial engagements for the completion of such purchase "and to organize a new corporation in behalf of said bondholders, "and to do all things needful for the protection of their interests," having performed the duties assigned to them, beg leave to report their proceedings:

Of the four million dollars of Third Mortgage bonds included in the foreclosure proceedings, your Committee received two million one hundred and eight thousand dollars ($2,108,000) from owners thereof, assenting to the terms of the foregoing appointment. We proceeded to St. Louis, and were all present at the sale of said Pacific Railroad, under decree of foreclosure in the city of St. Louis on the sixth day of September last. In accordance with the instructions of the Committee, the property covered by the Third Mortgage was purchased in behalf of the subscribers to the bondholder's agreement by Andrew Peirce, in the name of James Baker, for the sum of THREE MILLIONS OF DOLLARS ($3,000,000). Subsequent to the sale, to wit: on the 8th day of September, an arrangement was entered into with C. K. Garrison to combine the interests in the Third Mortgage bonds, represented by himself ($1,840,000) with those represented by your Committee, and to organize a new company in which the interests of all bondholders represented by Mr. Garrison

and your Committee should be impartially protected and promoted. Under this plan of co-operation the successor company was duly incorporated under the title of

THE MISSOURI PACIFIC RAILWAY COMPANY,

with an authorized capital of three millions of dollars ($3,000,000). The capital was fixed at this sum in compliance with the laws of Missouri, which require in the incorporation of railway companies a subscription of not less than $10,000 per mile of railway included in the organization. Capital stock to the amount of EIGHT HUNDRED THOUSAND DOLLARS ($800,000) only will be created, and issued to the bondholders represented on full payment therefor in cash.

The sale to James Baker was confirmed by the Court, and the property and franchises covered by the purchase have been conveyed to the Missouri Pacific Railway Company, of which C. K. Garrison has been chosen President. A new issue of Third Mortgage bonds has been created, bearing interest at the rate of seven per cent. per annum from November 1st, 1876, and secured by mortgage on all the property.

The new bonds will be issued to the bondholders represented in the new company, in sums corresponding with the amounts of old bonds heretofore surrendered by them, and now cancelled by the foreclosure. The accrued interest on the old bonds, including coupons due thereon, on November 1st, 1876, will be paid in cash.

The $800,000 capital stock of the new company has been subscribed for as follows:

By C. K. Garrison, ...	$405,000 00
" Committee in your behalf, . .	395,000 00
	$800,000 00

The $395,000 of stock subscribed for in your behalf will be apportioned among the owners of the $2,108,000 of old Third Mortgage bonds, *pro rata*, as nearly as may be, without creating fractions of shares. You will be required to pay cash in full for the stock, and will receive cash for accrued interest on the old bonds, and receive the new bonds as soon as the new securities are ready for delivery. The sum of one dollar per bond will be required from you in payment of expenses of the trust assumed in your behalf.

A detailed statement of adjustment to be made with each Bondholder, with notice of date when the new securities will be ready for delivery, will accompany this report.

Settlements will be made at the National Trust Company's office, Corner of Broadway and Warren street. in the city of New York, and it is important that they be made promptly.

Congratulating you upon the promptness with which we have been enabled to execute the purposes of our appointment,

We remain.

Your Obedient Servants,

D. R. MANGUM,
JOSEPH SELIGMAN,
ANDREW PIERCE,
THOS. T. BUCKLEY,
GEORGE F. STONE,
} Committee.

NEW YORK, November 10th, 1876.

CLINTON B. FISK,
Secretary.

IN SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1879. NO. 242.

THE PACIFIC RAILROAD,

Appellant,

vs.

GEORGE E. KETCHUM

AND OTHERS,

Respondents.

Affidavits and Documents in support of Answer to Motion to Dismiss Appeal.

Supreme Court

OF THE UNITED STATES.

THE PACIFIC RAILROAD, *Appellant*, *vs.* GEORGE E. KETCHUM, C. K. GARRISON, *et al.*, *Appellees.*	October Term, 1879. No. 242.

Answer of the Pacific Railroad to Motion to dismiss.

The Pacific Railroad, by its Solicitor, N. A. COWDREY, comes into Court and protests and says that it ought not to be held to make answer to any of the averments and allegations contained in the motion to dismiss, and prays that said motion to dismiss may be stricken from the files of this Court.

1st.—Because that it is the mere naked allegations of James O. Broadhead, Esq., and M. C. Day, Esq., not made under oath by themselves or by any of the parties whom they claim to represent.

2d.—That one of the parties they claim to represent has never made itself in any manner a party to the record, viz.: the "Missouri Pacific Railway Company," although it may have the right to do so; it has never taken any steps so to do.

And it appears on the face of the papers (see Baker's affidavit, p. 45,) that both of the other parties for whom said Broadhead and Day appear, have denuded themselves of any interest in the controversy by receiving bonds and shares of a new corporation, viz.: of the Missouri Pacific Railway Company.

Therefore, the Pacific Railroad avers that Messrs Broadhead and Day, the signers of said motion to dismiss, do not represent any party before the Court as shown by the records.

3rd.—The matters and things contained in said petition of said Broadhead and Day are no part of the record either in this Court, or in the Circuit Court, but are extraneous matters improperly brought before this Court. "Appeals in Equity are heard in this Court upon the pleadings and proofs below. No new evidence can be submitted, nor can the pleadings be amended here."

91 U. S. Repts., 149. *Rower vs. Simon.*
95 " " 1. *Pacific R. R. vs. Ketchum.*
18 Howard, 530. *Hodgkins vs. Kemp.*

PACIFIC RAILROAD,
By N. A. COWDREY, *Solicitor.*

If this Court holds that said Pacific Railroad must answer said petition to dismiss or take the consequences of not answering, then said Pacific Railroad answers and says:

1st.—That the decree and sale of the Pacific Railroad as set forth in said petition to dismiss, was *unauthorized; fraudulent and void,* for reasons more particularly set forth in Brief of counsel of said Pacific Railroad now submitted. That it purported to be a consent decree—an agreement between all the parties to the proceedings, except the Pacific Railroad—that Jas. Baker, the solicitor, consenting on behalf of said Pacific Railroad, was not authorized to give the consent he gave; hence there was no consent on the part of said Pacific Railroad, and the decree and sale founded upon a pretended consent, is void.

2d.—The Pacific Railroad admits that the individual stockholders, N. A. Cowdrey, *et. al.*, petitioned the Court for liberty to intervene and defend said suits, and that said petition was denied.

And that this Court refused to issue its mandate to the Circuit Court, commanding it to allow said stockholders to intervene, as shown in

94 U. S. Repts, p. 14, *Ex parte Cutting.*

3rd.—It admits that an annual meeting of the stockholders was held March 27th and 29th, at which directors were chosen; but it avers that because of the previous acts and conspiracies of its directors, that said directors had procured the passage of an act by the State of Missouri, authorizing the directors to so classify themselves that each class might hold office for three years, for which reason, at said annual meeting, the stockholders could only elect four directors out of a board consisting of thirteen, which the stockholders did elect.

It also avers that the stockholders at the same meeting, *unanimously* passed a resolution asking the hold over directors to resign, that the stockholders might fill their places with men in whom they had more confidence; that with one single exception they declined to do so, the effect of which action on the part of the delinquent directors was to prevent the stockholders from defending said suit.

It also avers that said annual meeting adjourned to meet at the call of the Chairman of the meeting, as shown on page 4 of the petition to dismiss.

And that the Chairman did call said adjourned annual meeting of stockholders, which was held on December 14th, 1876.

That the doings of said annual meeting are shown by Exhibit 1 to this answer, and in part on page 65 of the record in this case, to which we beg leave to refer.

That subsequently, at the next annual meeting of the stockholders, held in March, 1877, and at a Directors' meeting held the following day, all the acts of the stockholders and of the committee theretofore appointed, were ratified and adopted by both the stockholders and the directors. The stockholders, having at the last named annual meeting elected four more directors, making eight out of thirteen, were then for the first time enabled to get faithful and judicious action on the part of the Board of Directors.

Copies of the doings of said meeting of stockholders and directors are hereto attached, marked Exhibit 1.

4th.—The *Pacific Railroad* admits it to be true that the old Board of Directors, on and before and afterwards refused to employ counsel to defend said foreclosure suit,

or to allow the stockholders to do so in the name of the corporation, as shown on page 7 of the petition to dismiss.

5th.—The Pacific Railroad admits that the purchasers at said foreclosure sale have sold out their interest in the property involved in this suit, as averred in the petition to dismiss, page 7, and it avers that said purchasers having so sold out as averred by themselves, they have now no interest in these proceedings, and that they are voluntary interlopers in the business of this Court, and that they should not be heard here for the reason that they have no interest to protect or to be injured.

6th.—The Pacific Railroad admits that certain individual stockholders did make a contract with C. K. Garrison as set forth in the petition to dismiss, p. 29 and 33, the effect of which was to make good the bonds claimed and believed to have been fraudulent, held and represented by Garrison, known as 3d Mortgage Bonds, and to give all the stockholders the same number of shares or equity in the property as they held before validating said bonds.

But it avers that it was no party to said agreement, and that Garrison, as soon as he got said decree and sale which he supposed put his bonds beyond controversy, at once commenced to cheat and defraud the stockholders by refusing to keep his agreement with them, which, when he made, he called upon God, and his, (Garrison) Son and Executor in the most solemn manner to witness his good faith and sincere intention to keep and perform said agreement.

That it is true said individual stockholders have brought suit in the City of New York against said Garrison for the damages sustained by them for the breach of

his agreement, as shown on p. 20 and 41 of petition to dismiss.

The Pacific Railroad avers that it was no party to said agreement made with said individual stockholders, and that it is not a party to said suit against Garrison pending in the City of New York or rather in the Court of Appeals at Albany. The record set forth in said motion to dismiss, p. 34 and 41, shows that Garrison, while admitting that he made said agreement denies its validity, hence he ought not to be allowed here to claim any advantages under an agreement which he denies in the tribunal where the agrieved parties are seeking to enforce it.

7th.—The Pacific Railroad admits it to be true as set forth in the petition to dismiss, p. 9, that the answer to said bill of foreclosure filed by James Baker, did contain the clause therein set forth, asking as shown on p. 16 of the record, which clause reads as follows: "Therefore, this defendant asks this honorable Court *to prevent* any of the stockholders aforesaid to become a party defendant to this suit upon a proper showing, and make such defence in the premises as they see proper."

It is probable that in a blind sort of way Baker did intend to get something on the record which would bind the stockholders. Has he done so? The language used speaks for itself.

The Court, as we believe, on his procurement, refused to allow the stockholders, as such, to intervene and to make any defence. The directors of the company refused to allow the stockholders to put in an answer in the corporate name, p. 9 of motion to dismiss.

They seemed to do that which they did not do.

They said: "I go, but went not."

8th.—The Pacific Railroad denies that its stockholders ever, in in any manner or form, consented to making the said third mortgage, the one foreclosed which consent was required by the Statutes of Missouri.

And it avers, that its then President, Mr. Choteau, was mistaken in that and other points in the letter prepared by Baker, and signed by Chotteau, set forth at page 48 of the petition to dismiss. Mr. Choteau had previously been asked by the stockholders to resign, and, at the request of Garrison, had declined to do so.

9th.—The Pacific Railroad denies that its stockholders ever withdrew any defence to the suit; if the allusion is to Cutting, *et al*, it is not true; if it is to Akers, this intervention was bogus and fraudulent; he had no stock; he was controlled by Garrison promising to give him future employment at a good salary, which he did do as long as Akers lived. And the Pacific Railroad avers that this agreement by Garrison with Akers, was the only agreement made by Garrison in relation to this matter, which he, Garrison, is known to have kept. He cheated the stockholders, the County of St. Louis, the citizens of St Louis, and some of the counsel employed by him. His agreement with Akers, was kept probably from fear. Akers had the reputation of being fearless and desperate, and a dangerous man to cheat.

10th.—The Pacific Railroad admits that Garrison has sold out, and avers that his interest as a stockholder was fifty-one per cent. of the stock; that he received $3,000,000 for said fifty-one per cent. of the stock, which is at the rate of $6,000,000 for the capital stock of the Company. That the capital stock is now loaded with $250,000 more mortgage debt than when the premises were sold by the Circuit Court. It admits that the sale made by Garrison was at a fair valuation of the property.

And it avers that upon that valuation its stockholders had wrongfully taken from them by the Circuit Court, $6,000,000.

It denies that the decree was ever supposed to be final; it has exerted itself in every way which counsel have suggested, to get it reversed, from the time it was entered, to the present time.

Every person who has bought into the successor R. R. Company has bought with full notice of the pendency of this appeal.

11th.—The Pacific Railroad appears now in this Court, and denies that it is dead, but avers that it is a living being with great and enormous wrongs to redress; and it fully expects to have its property restored to it, to pay *all* of its just debts, and to become a useful corporation, to the public in moving persons and property.

It denies that there are any innocent purchasers of its property under said decree or sale, or from any purchaser at said sale.

12th.—The Pacific Railroad denies the truth of the allegation of James Baker that he filed the answer of said Company by direction of the Board of Directors, as averred, page 43 of petition to dismiss, and asks for permission to take proof on that subject.

It admits that Cowdrey, *et. al.*, at the annual meeting, represented a very large interest in the stock amounting to over $3,600,000 of the stock of the corporation, and nearly all that voted at said meeting, but avers that the directors, of whom Baker was one, utterly and wholly refused to listen to them, or in any manner to be guided by the wishes and advice of the stockholders.

It denies that either it, as a corporation, or the individual stockholders therein ever directed him, the said Baker, to favor and assist the bringing of the said foreclosure suit to a decree in favor of the plaintiffs, as soon as under the rules and practice it could be done, or otherwise.

13th.—It also denies that Mr. John R. Shepley, as attorney of the stockholders, was present in Court both in April and June, and that he urged the Court to render a decree as prayed in the bill, and that he was present at his own office at St. Louis, assisting and taking part in the form of the decree to be entered, and that he was present, assenting to the same when it was ordered to be entered.

And avers that what Mr. Shepley did do or did not do, is fully shown in his affidavit and that of Mr. Glover his partner—both hereto attached, marked Exhibit 2, which flatly contradict Mr. Baker.

It avers that Shepley's action in remaining silent on one occasion in court, as shown by his affidavit, was caused by the fraudulent and untruthful conduct of Garrison, who, by his agreement, as set forth in said motion, p. 29, misled and deceived said Shepley, and also said stockholders, at whose instance said Shepley acted; and on this subject the said Pacific Railroad prays that proof may be taken.

14th.—The Pacific Railroad denies that there was any substantial competing bids at the Master's Sale of said premises.

And avers that Baker and Garrison made, in the city of New York, just before the sale, a secret agreement as to how the sale was to be conducted; that Sage was privy to said agreement and a party thereto; that said sale was made as agreed by and between said Garriso

and Baker; that Baker was paid the sum of $25,000 or thereabouts for his services in the matter, which were adverse to the interest of said Pacific Railroad, whose Attorney and Director he then was. That the sale was conducted and bids made according to the previous agreement by Garrison and Baker.

That the bids made by Pierce were collusive with Baker; that Pierce had no ability to buy said road; he was at that very time in great financial embarrassment, and without credit, and was under a dark cloud for his management and transactions with Railroad Companies, which he hoped Garrison would relieve him from, or give him material aid in overcoming.

15th.—The sale was confirmed because the Circuit Court harshly, and, we think, unjustly refused to allow the stockholders to become parties to the record that they might be heard on the questions pending before the Court. The directors refused to allow the stockholders to appear and object to the confirmation in the name of the corporation—although Baker swears that the stockholders who applied for liberty to use its name, represented all the stockholders of the corporation, p. 43 of motion to dismiss.

On the above matters of denial and averment, the Pacific Railroad asks that proof may be taken.

16th.—The Pacific Railroad admits that Baker conveyed the property purchased by him to the new Company as alleged, p. 45 of motion to dismiss.

And avers that the conveying of it denudes him of all interest in this appeal, and that he has no right to appear here by counsel or otherwise, to be heard on any of the matters at issue in this cause.

Reply to Additional Affidavits and Documents on Motion to Dismiss.

In reply to the additional affidavits and documents to be used by the petitioners to dismiss, the Pacific Railroad replies and says:

17th.—That it is not true as affirmed by Baker, in his additional affidavit, p. 2, that C. K. Garrison owed or controlled $1,800,000 of the bonds, or thereabouts, adverse in interest to the bonds represented by Baker.

And it avers that the interest was joint and mutual, it was all one thing; there was no ability on the part of Baker, or those he pretended to represent to buy the road, without aid from Garrison and Sage, who had to, and did furnish the money required with which to do so. Baker's pretended bondholders and new clients except Garrison & Sage, had no money with which to buy the road, which was well known to Baker.

In causing Pierce to bid for him, Baker, he, Baker, relied upon Garrison furnishing the means with which to pay the bid. Baker's or C. B. Fisk's pretended committee made no provision whatever for paying for the road; they had not the ability so to do; had they made an effort, but they made no effort except with Garrison and Sage.

The Pacific Railroad avers that the whole thing was a humbug, and in proof of this, instances the fact that the evening after it was announced that Garrison had bought the road, he was serenaded by what purported, in the Newspapers, to be the Merchants of St. Louis, but really by a crowd of boys and idlers gathered together by the sound of a Brass Band, the funds to pay for which was furnished by Garrison or by his attorney, F. J. Bowman, Esq. That Garrison addressed the audience so assembled as the merchants of St. Louis and promised them to establish a line of steamers from St. Louis to Rio

Janiero, which latter place at that time he dared not visit for fear of arrest on a charge of fraud, which charge he has since settled by the payment of $500,000 and upwards. Garrison, got up and paid for his own serenade.

18th.—The Pacific Railroad avers that the affidavit of Clinton B. Fisk is practically of the same character, a *humbug*.

That said pretended meeting of bondholders was got up at the instance of Garrison, to make a record to enable him, to have an excuse for not keeping his agreement with the individual stockholders, the one set forth on page 29 of motion to dismiss.

That the list of bondholders there given is fictitious, and was never signed by all the men whose names it purports to bear; and many of those who did sign it, had no bonds, or no such amount of bonds, as is placed opposite to their names.

The committee appointed to buy the road had no financial ability to do so. Mangum and Pierce were bankrupts or nearly so. Mangum was shortly after and is now under indictment for fraud and perjury in the matters of the National Trust Company, and was about that time arrested for cheating and defrauding his son's widow. Seligman and Stone had not sufficient means with which to buy the road, or any where nearly to do so. Garrison and Sage, by their large ownership of bonds and their great wealth and command of ready money, were practically the only men who could buy the road.

Mr. Fisk's committee were a farce and humbug, organized by the kind of men, and for the purpose above set forth, to give Garrison an excuse for not keeping his agreement; whereby he had agreed to buy the road. The doings of said pretended committee have been allowed to

sleep in the hands of its nurse since 1876, to this time, when it is brought forth, as the Pacific Railroad avers, to impose upon this Court.

The complaint avers, Record, p. 7, that there had been issued about $2,300,000 of said 3d Mortgage Bonds; the actual amount was $2,200,000; there is no record that that sum had then been increased. The decree, Record, p. 45, finds that the Income and Improvement Bonds had not then, June 6th, 1876, been converted into 3d Mortgage Bonds.

Baker makes affidavit, p. 2 of Supplemental Motion, that C. K. Garrison had $1,800,000 of these bonds and the decree finds such to be the fact (he actually had over $2,000,000.) Garrison himself says in his letter of compromise, which is attached to the motion to dismiss, that he had or represented $2,200,000.

With but $2,200,000 issued, of which Garrison owned $1,800,000, this leaves according to the record in this case, $400,000 or $500,000 of 3d Mortgage Bonds outstanding in scattered lots. Notwithstanding these recorded facts, C. B. Fisk's record makes his committee have $2,176,000 of the 3d Mortgage Bonds, outside of the $1,800,000 owned by Garrison, which by this method of testing its truth, is about $1,700,000 more than they could possibly have; for there is no proof that any greater amount than $2,300,000 were issued at that time, and they could not have been rightfully issued without the record showing it, because the entire books and property, bonds and papers, were in the hands of the Receivers appointed by the Court.

On all the above matters and things, if they are in any way material to the trial of this cause, the Pacific Railroad asks that proofs may be taken.

PACIFIC RAILROAD,

By N. A. COWDREY, *Solicitor.*

EXHIBIT 1.

(THE RECORD OF STOCKHOLDER'S MEETING OF MARCH 1877, HAD NOT COME TO HAND AT THE TIME THIS DOCUMENT WAS PRINTED.)

EXHIBIT 1.—CONTINUED.

PACIFIC RAILROAD (OF MISSOURI,) *Appellant,*

vs.

GEORGE E. KETCHUM. C. K. GARRISON, *et al.*

Supreme Court of the United States. October Term 1879. No. 242.

AFFIDAVIT OF JOHN C. PORTER, SECRETARY OF PACIFIC RAILROAD, OF DOINGS OF DIRECTOR'S MEETING HELD MARCH 26th, 1877.

JOHN C. PORTER being duly sworn on his oath, states that he was duly elected Secretary of the Board of Directors of the Pacific Railroad, appellant, herein and acted as such Secretary at a meeting of the Board of Directors of said Company held at St. Louis on the 26th day of March, 1877, where the following proceedings of the Board of Directors of the said Pacific Railroad, appellant, were, had, viz:—

ST LOUIS, March 26th, 1877.

The Board of Directors of the Pacific Railroad met this day at Room 17, Lindell Hotel, St. Louis, Missouri, in accordance with notification, for the purpose of organization and election of officers.

The meeting having been called to order, on motion of Mr. Leighton, Mr. David Rankin, Jr., was unanimously requested to act as Chairman. Upon the roll being called the following members were found to be present: Messrs. W. E. Burr, Rob't. L. Cutting, Jr., Geo. E. Leighton, E. F. Leonard, Peter Marié, D. Rankin, Jr. and Thos. Rankin, Jr.

Mr. Leonard informed the Board that the term of office of Mr. Chas. P. Chouteon as Director and President of this Railroad had expired, and moved that the Board proceed to an election for President, which motion was carried; and Mr. Marié was appointed teller.

Upon balloting Mr. Robert L. Cutting, Jr. received six votes, and was elected President of the Board of Directors of the Pacific Railroad.

Mr. Rankin having announced the result of the election, resigned the chair, and Mr. Cutting presided; a ballot was then had for Secretary of the Board, resulting in the election (by seven votes) of Mr. John C. Porter to that office.

Communications from Messrs. T. B. Edgar, Joseph L. Stephens resigning their positions as Directors of the Pacific Railroad were submitted and read. On motion of Mr. Marié, the Board accepted said resignations, and proceeded to elect Directors to fill the vacancies.

Upon balloting Mr. N. A. Cowdrey was elected unanimously to fill the vacancy caused by the resignation of Mr. Joseph L. Stephens.

Mr. Cowdrey appeared in his place at the Board

Mr. Adolph D. Paul was then unanimously elected a Director of the Pacific Railroad to fill the vacancy caused by the resignation of Mr. T. B. Edgar.

The following resolutions offered by Mr. Leonard and seconded by Mr. D. Rankin, Jr. were unanimously adopted:

Resolved, that the Board of Directors approve and affirm the action of Messrs. Glover and Shepley as the counsel of the Company, in taking the appeal to the Supreme Court of the United States, in the case of Ketchum vs. The Pacific Railroad and others, and in commencing suits in behalf of said Company, and assume the defence of the suits brought by John P. Kennedy against N. A. Cowdrey and Wm. Cross, and against Robert L. Cutting and others, as also the suit against George R. Fearing, and the suits of Francis Baby against Peter Marié, and against N. A. Cowdrey and against N. A. Cowdrey and Wm. Cross, and any suits hereafter commenced against any stockholders as such."

Resolved, that Glover and Shepley be appointed attorneys and counsel of tnis Company."

Mr. Paul appeared at the Board.

On motion the Board adjourned.

JOHN C. PORTER,

Secretary.

Said affiant states that the above is a true, perfect and complete copy of the proceedings of said Board of Directors held at said place on that day, as recorded by him as said Secretary.

JOHN C. PORTER.

Sworn to and subscribed by said John C. Porter before me, at St. Louis, in the Eastern District of Missouri, on the 12th day of January, A.D. 1880.

LUCIEN EATON.

Commissioner of the Circuit Court of the United States, for the Eastern District of Missouri.

EXHIBIT 2.

THE PACIFIC RAILROAD OF MISSOURI. *vs.* GEORGE E. KETCHUM, CORNELIUS K. GARRISON, THOMAS W. PIERCE, *et al.*	In the Supreme Court of the United States. No. 242. October Term, 1879.

AFFIDAVIT OF S. T. GLOVER, ESQ.

SAMUEL T. GLOVER, attorney at law of the city of St. Louis, in the State of Missouri, on his oath, states that he is a member of the law firm of Glover and Shepley, and was at the time of the facts hereinafter stated.

That his firm appeared in the Circuit Court as solicitors for and filed the amended motion of N. A. Cowdrey, Robert L. Cutting, Jr., Peter Marié, Frank A. Otis, Jacob Cromwell and George L. Kingsland for liberty "to intervene to set aside the decree of June 6th, 1876 in said cause and the sale, and for liberty to demur answer plead or appeal as advised," see printed record in this court, pp. 47, 48, 49, 50, 51, 52 and 53. That this affiant was present in the Circuit Court aforesaid, when the said motion to intervene, &c. was argued, that during the argument James Baker, Esq. stated to the Court, among other things, that Glover and Shepley had been present in the Court at the rendition of the said decree, and had assented to and approved the same, and they should not attempt to set it aside. This affiant was sitting in a few feet of said Baker, and rose immediately, and said to him in the hearing of the Court: Mr. Baker, you are greatly in error, when you say that I assented to said decree, for I was not present in the Court, nor in the city at the time. This affiant states that said Baker, after a moment's pause, said: "I did not intend to say that Mr. Glover assented to the decree. This affiant then said to Mr.

Baker in the hearing of the Court: "Mr. Shepley has stated to me that he never did assent to, or approve the said decree, that he was present at the time it was entered, but was silent and passive, submitting to the decree as the act of the Court, but giving no other or further consent; and now, as Mr. Shepley is not present, I wish to know from you, Mr. Baker, whether you intend to say that Mr. Shepley said or did anything in approval of that decree beyond what I have stated, as said by him to me. Mr. Baker replied to this that he could not say that Mr. Shepley did. This affiant saith that he has given the substance of his remarks and Mr. Baker's as above, and further saith not.

S. T. GLOVER.

Sworn to and subscribed by said Samuel T. Glover before me at St. Louis, in the Eastern District of Missouri, on the 7th day of January, A.D. 1880.

LUCIEN EATON,

Commissioner of the Circuit Court of the United States, for the Eastern District of Missouri.

EXHIBIT 2.—CONTINUED.

PACIFIC RAILROAD, *Appellant*, vs. GEORGE E. KETCHAM, *et al*, *Respondents*.	No. 242, October Term, 1879, in the Supreme Court of the United States.

AFFIDAVIT OF JOHN R. SHEPLEY, Esq.

I, JOHN R. SHEPLEY, being duly sworn, on my oath state that I have read what purports to be a printed copy of an affidavit made by James Baker, on the 24th day of December, 1879, and filed in said Supreme Court as "Exhibit No. 4," to a motion filed in said cause to dismiss the appeal therein, in which he speaks of my being present both in April and June, 1879, and urging the Court to render a decree as prayed in the Bill, and that I was also present at my own office in St. Louis, with Mr. James O. Broadhead, Mr. Frank J. Bowman, and himself assisting, and taking part in settling the form of a decree to be entered, and that I agreed to the same as it was afterwards entered, and was present, assenting to the same when it was ordered to be entered. Mr. Baker is entirely mistaken about the matter as to my having assisted in settling the form or assenting to the rendering of the decree. He made some observations of a similar character, as I was informed in Court on the last of September or first of October, 1876, when I was not present, when he was corrected by my partner, S. T. Glover. The firm of Glover & Shepley had been, prior to 1876, employed by Peter Marie, N. A. Cowdrey and some others in proceedings instituted to prevent a foreclosure of the third mortgage of the Pacific Railroad in the suit brought by George E. Ketchum and others against said Railroad Company and others for that purpose, and while, after that time no opposition was made by said firm,

said Glover and Shepley did not consider themselves to be authorized to assent to anything on the part of their clients, and did not assent to said foreclosure, or to anything looking to said foreclosure. I recollect that at sometime in the spring of that year, James Baker, accompanied by Frank J. Bowman, came to my office in St. Louis, on his own motion, and without any agreement or understanding with me, and somewhat to my surprise at the time, as I remember, and Mr. Baker said to me that he had in his hands what he said was the draft of a decree which he proposed to present to Judge Caldwell. I have no recollection of Mr. Broadhead's accompanying him, but it may have been so. According to my present recollection I did not read it. This is my strong recollection. Mr. Baker very likely stated to me its general features, I neither assented or dissented, as I had nothing to do in the matter. My recollection is that I was in Court in April and in June, 1876, when the matter of a decree in the cause came up, but I certainly never urged the Court to render this or any decree in said cause. I have read what my partner S. T. Glover has stated in his affidavit in reference to what Mr. Baker stated in Court in reference to my assenting to said decree. He repeated the observation of Mr. Baker to me at that time, and I said to him that Mr. Baker was entirely mistaken in his recollection of the matter; that I was entirely passive in the matter, neither assenting or dissenting. This was the fact. And further said affiant says not.

JOHN R. SHEPLEY.

Sworn to and subscribed by said John R. Shepley, before me at St. Louis, in the Eastern District of Missouri, on the Seventh day of January, A.D., 1880.

LUCIEN EATON,

Commissioner of the Circuit Court of the United States for the Eastern District of Missouri.

EXHIBIT "3."

AGREEMENT OF C. K. GARRISON WITH ST. LOUIS COUNTY.

To the Hon. C. F. Shultz, James S. Farrar, Jno. D. Finney, *Committee of the County Court of St. Louis County on the Pacific Railroad.*

Gentlemen: It has been intimated to me that the judges of the County Court of St. Louis County, as the representatives of the county, have no desire to delay the proceedings in the suit now pending in the United States Circuit Court, looking to the foreclosure of the Pacific Railroad under the third mortgage bonds, otherwise than to obtain if you can, some settlement of the county's claim against the road for $700,000 and interest, by reason of a loan made to the road by the county, and which still remains unpaid.

As you may perhaps know, I, and parties associated with me, are the owners and holders of the principal portion of these third mortgage bonds, and we are advised by those who are conversant with its affairs that the company will not be able to pay the interest on these bonds, (two installments of which are now due and remain unpaid,) and that it is inevitable that the road will have to be sold under the third mortgage. Such being the facts, we feel that it is important to the protection of our interests that the road should be sold as soon as practicable, so that it may become the property of a new organization that will be able to put it upon a secure financial basis and bring it to its highest capacity for producing a revenue in such a way as to be mutually advantageous to its owners and to the cities and towns to which it is tributary.

In the event that the road is sold under the third mortgage, I cannot give you any promise that I, or those who are associated with me as the holders of the bonds will become the purchasers, as others may estimate the value

of the road higher than we do and be willing to pay a greater price for it. But so far as I can foresee, it seems in the highest degree probable that we will have to become the purchasers of the road in order to protect the investment we have made in these bonds.

And if we purchase the road, it is our determination to organize a new company which will own and operate the road with a sufficient capital stock to put it upon a sure and permanent financial basis, and as it is contemplated that the capital stock will be used in operating and developing the road, and not for the payment of the purchase money or our interest in the present bonds, we propose that the new organization will issue a new mortgage on the entire road, bearing interest at the rate of seven per cent. payable semi-annually, securing bonds in sufficient amount to cover the present third mortgage bonds held by us and the accrued interest thereon.

If the claim of the county on the road is a lien paramount to the third mortgage bonds, then, of course, the sale cannot affect the claim, and the county is abundantly secured. But even if it has no such lien, considering the circumstances under which the debt was contracted, and the benefit that the road received therefrom, the claim is eminently a just one, and it is my feeling that as a matter of policy for retaining for the railroad the good feeling and good offices of the people and the tax-payers of St. Louis County, it will be to the interest of the purchasers to give to the county, if it shall be desired security of a recognized commercial value in substitution for its present claims.

Entertaining these views, I am willing and hereby agree that if I, or my associates, or any one in our behalf, shall become the purchasers of the Pacific Railroad under the present third mortgage under a sale which shall become duly confirmed to such purchaser prior to January 1, 1877, and if further the county court shall agree by an official action on its part, within thirty days after such confirmation, to take mortgage bonds of the said new corporation in

substitution for its present claim and the interest accrued thereon, then we will make the said new mortgage sufficiently large (the amount not to exceed $5,000,000) to cover not only the present third mortgage bonds held by us, but also the county's claim of $700,000 and the interest accrued thereon, and will, upon the request of the county made within the time above designated, deliver to its authorized agents, a number of the said new mortgage bonds, which at their par value shall equal the amount of the county's present claim of $700,000 and the accrued interest thereon at the time of the making of such substitution, and which shall be received by the county in substitution for its present claim.

And I believe that the proposed new bonds will be a good and reliable security for the amount of the county's claim when it is protected by the capital stock of the new organization.

But I will add that I do not wish you, as the representatives of the county, to do anything to impair any existing rights that it may have on its claim. My only desire is to avoid litigation, which can prove of no ultimate benefit to the county, but which by its delays may prejudice the rights of myself and others who are largely interested in the securities of the road, and who deem it important for our protection that it should as speedily as possible be placed under a permanent management, where its operations can be extended and its credit established.

I am willing that if the decree of sale is made in the suit now pending, that it may be subject to any permanent right or lien that St. Louis County may have on its claim prior to the third mortgage, leaving it with you to determine hereafter, in case I become the purchaser, whether you will rely upon the claim in its present form or take the substituted securities.

But the assurances herein given are predicated and conditional upon the event of the road being sold and confirmed within the time above mentioned, and that the county shall

have made the election to take the substituted security within thirty days after the confirmation of the sale. Both these elements are important—the one looking to a speedy sale of the road, and the other to guide the new organization in determining the amount of the new mortgage to be issued.

You can consider the proposition that I make, and if you see any advantage in it to the county, and if by a withdrawal of proceedings that are merely calculated to delay an immediate sale of the road can be obtained, I think the result will be one of mutual benefit to the tax-payers of the county as well as those who are interested in the future of the Pacific Railroad.

Respectfully yours,

C. K. GARRISON.

June 1, 1876.

ADDITION TO BRIEF OF APPELLANT TO BE AFFIXED UNDER HEAD OF FRAUD, PAGE 19.

Extract from James Baker's testimony taken at St. Louis in the bankruptcy proceedings instituted by the county of St. Louis in the United States District Court vs. Pacific Railroad.

The Mr. Litton named was the assistant attorney of the *Pacific Railroad* and occupied the same office with James Baker.

The Littlefield bill was filed against the Atlantic & Pacific Railroad, and the Pacific Railroad. A receiver for both roads was appointed under the Littlefield bill.

Q. You had gone to New York, and were then engaged in consultation with reference to this Littlefield bill?

A. Yes, sir.

Q. And you had done so before the bankruptcy proceedings were commenced?

A. Yes, sir.

Q. Was this matter brought up before the board, or any member of the board of the Atlantic & Pacific Railroad in New York, before the preparation of the bill was commenced—the Littlefield bill?

A. I did not see the board in session there; I saw several members of the board.

Q. Did you consult with any members of the board before doing so?

A. Yes, sir, I consulted several days (and the bill was printed before the bankruptcy proceedings were filed.)

Q. With which members of the board did you consult?

A. Well, I saw several of them; they were not altogether in any consultation; I talked with Mr. Pierce, Seligman and so forth.

Q. Joseph Seligman?

A. Yes, sir.

Q. Did you talk with Clinton B. Fisk?

A. Yes—well—very little with Fisk.

Q. You mentioned the matter to him?

A. Yes, I think so.

Q. What day did you reach New York, do you remember?

A. I do not remember; I think it was about the 15th, probably.

Q. The 15th of October?

A. The 15th of October.

Q. You were there some two weeks?

A. Yes, sir; I think so.

Q. You went from here for the purpose of taking action in that matter?

A. I went there in regard to the trouble that had come on them there, without any definite view when I went there.

Q. That was the conclusion you reached after arriving there?

A. Yes, sir.

Q. By whom was the bill of George E. Ketchum, for foreclosure of the Missouri Pacific, prepared?

A. I presume by Mr. Burrill; I was not there when it was done.

Q. Who engaged Mr. Burrill in the preparation of the first bill of Littlefield?

A. I don't know, sir; he was in consultation; he was in consultation when I went there.

Q. With whom?

A. Well, with various parties in interest.

Q. Mr. Pierce?

A. Mr. Pierce, among others.

Q. Mr. Seligman?

A. I don't know whether Mr. Seligman ever saw him or not about it.

Q. He is the same party who prepared the bill for George E. Ketchum, as far as you know?

A. I think so; I don't know, but I think so.

Q. Have you had control of the bill—the Ketchum bill—at any time?

A. What do you mean?

Q. Have you had it in your possession or control before it was filed?

A. I don't think I ever saw it; I am not sure, I don't think I ever saw it before it was filed.

Q. Was the bill sent to Omaha?

A. It was; that is, I suppose it was.

Q. Who took it there!

A. I do not know; I expect the mail.

Q. Was it brought from Omaha?

A. I think it was.

Q. Who brought it?

A. I didn't bring it; I didn't see anybody bring it.

Q. Do you know or have you any information as to whether Mr. Litton brought it?

A. I have heard somebody say so.

Q. Did Mr. Litton go there, under your instructions, to Omaha?

A. Yes, sir; I think he did.

Q. With reference to this bill?

A. Yes, sir.

Q. With instructions to have the bill brought back here?

A. Yes; with the instructions that they were to have no action on it there if they could prevent it.

Q. That matter was under your control?

A. I was one of the defendants in the case.

Q. The matter was under your control, of the presentment or not of that bill, was it not?

A. No, sir; not absolutely, *though I have no doubt they would take my suggestion or advice.*

Q. You considered yourself in control of it, didn't you?

A. I did not.

Q. Who was, if you were not?

A. My understanding is Judge Grant, of Davenport.

Q. Your understanding was that Judge Grant, of Davenport, would act upon your advice and direction in the matter?

A. I believed he would; there never was any understanding about it, but I believed he would.

Q. You directed the bill not to be presented there, but to be brought back here?

A. I telegraphed to Mr. Lytton to have the bill withdrawn, if he could, and I suppose he got the telegram.

Q. He did it under your direction, and the bill was filed here, was it not?

A. *Yes, sir; I at least sanctioned—I did not do it—I sanctioned it.*

Q. Was the bill prepared by your advice?

A. I don't remember of giving any advice; I may; I don't remember it to that effect.

Q. What was your first knowledge of or concerning the bill?

A. Well, I received telegrams here that there was a bill prepared and would be presented there, *and I believe I had a notice sent out here to be served.*

Q. How did the bill come to St. Louis?

A. That bill?

Q. Yes, sir?

A. I don't know, I am sure, personally.

Q. Did not Mr. Litton bring that bill from Omaha?

A. I think he did; I don't know it.

Q. Didn't he so report to you, as your agent in that matter?

A. No, he never was my agent.

Q. Did you not send him to Omaha—did not he go under your direction?

A. Well, yes; under my advice and direction he went there.

Q. He came back and reported to you that he had brought the bill to St. Louis, didn't he?

A. I think he did; I don't know whether he did or not—I don't remember.

Q. Do you remember whether you gave him any instructions as to what to do with the bill, then?

A. I don't remember that I did, but I guess he put it in his drawer.

Q. Under whose instructions was it taken from the drawer, and how it came to be filed in the court; state fully your information on that subject?

A. I have answered that twice.

Q. I haven't understood you and want you to repeat it?

A. Well, I don't know who filed it, personally; I could guess at it; I don't know as I could guess at it either, exactly.

Q. What is your best information on the subject?

A. I think Mr. Porteus took it to Mr. Broadhead, but I am not sure.

Q. Who is Mr. Porteus?

A. *He is one of our attorneys in our office.*

Q. Well, judge, this bill was not taken from the office of the Railroad Company without your sanction and consent, was it?

A. No, sir; that is, not without my knowledge and consent; that is, I knew of it and consented to it.

Q. And directed it, did you not?

A. I advised it, probably; I know I consented to it.

Q. And directed it, did you not?

A. I advised it, probably; *I know I consented to it.*

Q. Didn't you give the order under which it was done; didn't that bill stay in that drawer until you gave the order?

A. I don't think I did.

Q. Who did give the order if you did not?

A. I expect I don't know; Mr. Litton, probably; I don't know who did.

Q. Mr. Litton, in all these matters, acted under your advice and instructions, didn't he, in matters of this importance?

A. Well, some things he did and some things he did not; we are not running the same stool factory here; he takes an immense portion of his business to himself and I take other portions to myself; we hardly ever act together in anything.

Q. Which of you took the bill to foreclose after the time it was brought from Omaha by Mr. Litton, and placed in the drawer at the railroad office?

A. I will say I don't think I ever had that bill in my hands.

Q. You don't mean to be understood that Mr. Litton would have assumed the responsibility of doing that without your sanction?

A. I have repeated it a half dozen times that I did sanction it; I think about half a dozen times.

Q. You did sanction the taking of it from the drawer and filing it?

A. I haven't said a word about taking it from the drawer; I said that I sanctioned the filing of that bill; I didn't speak of how we got it out of the drawer, or anything of the kind.

Q. Well, then, that bill, judge, was really filed in this court by your procurement, wasn't it?

A. By my consent, yes, sir; by my consent, certainly.

Q. And that is a bill to foreclose the Pacific Railroad under the third mortgage bonds, is it?

A. It is, as I understand it.

Q. For both of these bills?

A. I presume in both; certainly in one.

Q. I am referring to the Littlefield bill and the Ketchum bill (to foreclose on third mortgage)?

A. Yes, sir; I have no doubt but what they did coincide and sanction it; I have appeared for them and never resisted and don't expect to.

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 242.

PACIFIC RAILROAD (OF MISSOURI)

against

GEORGE E. KETCHUM ET AL.

DISTRICT OF COLUMBIA, CITY OF WASHINGTON, } *ss:*

N. A. Cowdrey, being duly sworn, on oath says:

That Exhibit 3, hereto attached, is a true copy of the proposition made by C. K. Garrison and accepted by the County of St. Louis, in pursuance whereof the County of St. Louis withdrew, on June 6, 1876, all opposition as theretofore made by said county to a decree of foreclosure of the Pacific Railroad, now on appeal in this Court, as deponent is informed by the agents and attorneys of the County of St. Louis, and that C. K. Garrison informed deponent that he had made an agreement with said city and county to withdraw further opposition to a decree being entered.

That said proposition and agreement, as set forth in said exhibit, was presented on or about June 3, 1876, in writing, over the signature of said Garrison, to the judges of the county court of St. Louis county, as an inducement to said county to withdraw their intervention in this suit as a party claiming interest in the stock of said Pacific Railroad, by

which said foreclosure was resisted, and the said agreement then made by the said Garrison was the cause of the withdrawal of said intervention and opposition by the attorney of the county on the 6th day of June following, and enabled said complainants to get said decree entered.

That said Garrison is now appearing in this Court to get this Court to aid him in refusing to carry into effect his agreement with said county. (See Record in No. 162.)

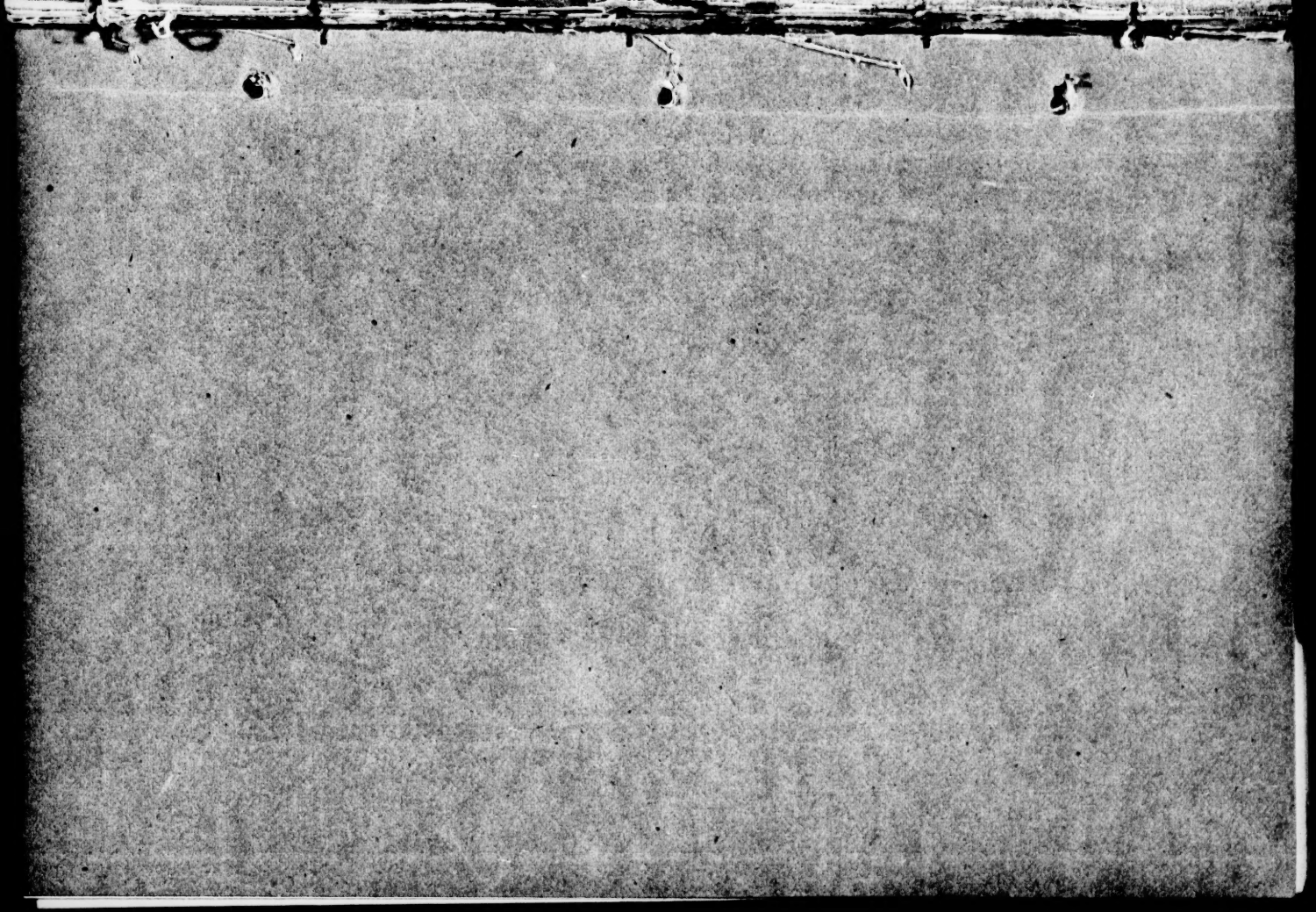
And I further state that the annexed extracts from James Baker's testimony was taken by me from a certified copy of his examination in the case of St. Louis County *vs.* Pacific Railroad, in the United States district court, in bankruptcy.

Further deponent saith not.

N. A. COWDREY.

Subscribed and sworn to before me, this 20th day of January, A. D. 1880.

[SEAL.] CHAS. B. BEALL,
Notary Public.



Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 242.

THE PACIFIC RAILROAD (OF MISSOURI),
Appellant,

against

GEORGE E. KETCHUM AND OTHERS,
Appellees.

Brief of Appellant's Counsel on behalf of The Pacific Railroad (of Missouri).

M. H. CARPENTER,
N. A. COWDREY,
TREMAIN & TYLER,
MASON W. TYLER,
Of Counsel for Appellants.

Supreme Court

OF THE UNITED STATES.

PACIFIC RAILROAD OF MISSOURI, Appellants.

vs.

GEORGE E. KETCHUM and others, Appellees.

No. 242, October Term, 1879.

Brief of Appellants in above-entitled Case, on Appeal from a Decree of Foreclosure and Sale entered in the Circuit Court of the United States for the Eastern District of Missouri, on the 6th Day of June, 1876, and the Orders confirming the Sale thereunder.

FACTS.

This is a suit for the foreclosure of a third mortgage alleged to have been executed by the appellant, the Pacific Railroad, to secure $4,000,000 of third mortgage bonds. The Pacific Railroad is a Missouri corporation owning the most important line of railway in that State, running from St. Louis to Kansas City, a distance of 283 miles (record, page 48, fol. 83). Its capital stock issued amounts at its par value to about $7,000,000 (record, page 49, fol. 85).

From 1869 to 1874 it exhibited annual net earnings rising from $945,000 in 1870 to $1,451,889 in 1874 (record, page 48, fol. 84).

In 1872 its total lien indebtedness amounted to $11,304,000, and its annual interest charge was about $800,000 (record, pages 1, 2 and 3, fols. 4 to 9; record, page 31, fol. 56).

Early in 1872 certain stockholders of the Atlantic and Pacific Railroad Company (a corporation organized under an act of Congress) obtained a controlling interest in the stock of the said Pacific Railroad of Missouri, elected their own directors, and on June 29th, 1872, they executed a lease of the Pacific Railroad to the Atlantic and Pacific Railroad Company, practically in perpetuity (record, page 30, fol. 55). The Atlantic and Pacific Railroad Company thus gained access to the City of St. Louis by running their trains over 40 miles of the track of the Pacific Railroad, and also acquired possession of the most valuable depot grounds owned by any railroad in the City of St. Louis (record, page 8, fol. 15).

The lease provided, among other things, "That the *Atlantic and Pacific Railroad Company shall have the right to borrow* such sums of money, at such rates of interest and payable at such times, as it shall deem proper for the purpose of improving the said demised and leased premises and increasing their usefulness, and for the purpose of paying the indebtedness of the said Pacific Railroad herein specified and hereby assumed by the said party of the second part; and for the purpose of securing the payment of the money so borrowed, the said Atlantic and Pacific Railroad Company shall have the right and is hereby vested with full power and authority to mortgage its leasehold estate and term" (see lease annexed to answer of St. Louis County as recited, page 30, fol. 55 but omitted from record).

The mortgage sought to be foreclosed in this suit recites this lease and its terms and that the mortgage is executed for the precise purpose for which the Atlantic and Pacific Company was to borrow money on its own credit and mortgage its leasehold estate and term.

After executing this lease the directors of the two companies, who were substantially identical, issued $1,500,000 of what they called Income Bonds of the Pacific Railroad of Missouri in August of that year. These bonds were appropriated to the use of the Atlantic and Pacific Railroad Company (record, page 7 fol. 13).

In December, 1874, they issued $2,000,000 of what they called Improvement Bonds of the said Pacific Railroad, which were never sold but were used to secure loans to the Atlantic and Pacific Railroad Company and its directors (record, page 32, fol. 58; page 36 fol. 65). Neither of these issues of bonds were secured by any mortgage or lien on the property of the company (record, page 7, fol. 13).

Early in 1875, the said directors concluded to better their fortunes by securing these loans by a mortgage upon the property of the Pacific Railroad (record, page 33, fol, 29.)

The laws of Missouri require the vote and ratification of the stockholders upon the issue of bonds by a corporation.

1 Wagner's Stat., 315.

The circular transmitted to the stockholders asked their as-sent to the issue of $4,000,000 *of bonds*, $3,500,000 to be used in retiring the above described Income and Improvement bonds, and $500,000 to be sold, *but no mention whatever was made of the contemplated mortgage, and the proxies inclosed for the stockholders to sign only authorized the issue of bonds* (record, page 34, fol. 61).

On the authority of a vote through these proxies taken on the 10th day of July, 1875, $4,000,000 of bonds *and a mortgage upon the property were issued and executed, bearing date the 10th day of July, 1875, but the first coupons were made to mature November 1st, 1875.* They were for six months interest at seven per cent (record, page 6, fol. 12; also page 35, fol. 62).

Before the first of November, 1875, preparations

were in progress to foreclose this mortgage. The mortgage was made to Henry F. Vail and James D. Fish, as trustees, both citizens of the State of New York. They had not the impudence to act as complainants in the contemplated cut-throat foreclosure suit, and the parties to the conspiracy were obliged to commence their suit in the name of a bondholder. The bill was printed; was sworn to in New York on November 3d, 1875. It must have been prepared before November 1st (see record, page 35, fol. 63).

JURISDICTIONAL FACTS ALLEGED IN THE BILL.

The bill avers that the "orator, George E. Ketchum, a citizen of the State of New York, who brings this bill of complaint against the Pacific Railroad, a corporation created under and by virtue of the laws of the State of Missouri, and against the Atlantic and Pacific Railroad Company, a corporation created and organized under and by virtue of an Act of Congress of the United States, approved July 27th, 1866, and at the several times hereinafter mentioned engaged in operating and maintaining a railroad in the State of Missouri aforesaid, and against James Baker, Rufus J. Lockland and Dwight Durkee, citizens of the State of Missouri, and Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett and Luther C. Clark, citizens of the State of New York," complains, &c. (record, page 1, fol. 4).

Synopsis of Proceedings.

1st. That the defendant, the Pacific Railroad, under date July 15th, 1868, made a mortgage to defendants, Murdock, Punnett and Clark, conveying its railroad, and issued bonds for $7,000,000 (record, page 1, fols. 4 to 6).

2d. That said defendant, Pacific Railroad, July 1st, 1871, made a second mortgage to defendants, Morgan and Joseph Seligman, conveying its railroad, and issued thereunder bonds for $3,000,000, of

which $196,000 have been redeemed (record, pages 4 to 6).

3d. That said defendant, Pacific Railroad, under date April 19th, 1872, made a mortgage covering its real estate in St. Louis to defendants, Lackland and Durkee, and issued bonds for $800,000 (record, page 43, fols. 7 to 9).

4th. That said Pacific Railroad built Carondelet Branch Railroad, and under date October 1st, 1873, mortgaged it to defendants, Jesse Seligman and Baker (record, page 4, fol. 9).

5th. That said Pacific Railroad made a mortgage to defendants, Vail and Fish, under date July 10th, 1875, conveying all its property; that said mortgage was made to secure 4,000 third mortgage bonds "of *$1,000 each, payable twenty years after date, with interest from May 1st, 1875*, payable semi-annually," and payment was guaranteed by the Atlantic and Pacific Railroad Company (record, pages 5 and 6, fols. 10 to 12).

That said mortgage contained a clause authorizing, *in case interest should not be paid within six months after it became due* and demand, said trustees, upon the written request of holders of $500,000 of bonds, to sell all the property at public auction upon a prescribed notice, and apply the net proceeds of sale to the payment of all the bonds secured by said mortgage *pro rata* (record, page 7, fols. 12 and 13).

That said mortgage recited issue of $1,500,000 "Income Bonds," and $2,000,000 Improvement Bonds, principal and interest chargeable against and payable out of the earnings of said railroad, but not secured by any lien, and a portion of said third mortgage bonds were to be used to retire said "Income and Improvement Bonds," and the balance for future permanent improvement of the road (record, page 7, fol. 13).

That all the said third mortgage bonds were issued and a sufficient number to retire the Income and Improvement Bonds were placed in the hands of

defendants Vail and Fish, for the purpose of being exchanged, and that about $2,000,000 of said Income and Improvement Bonds have already been exchanged; that all the bonds secured by said third mortgage are outstanding and unpaid, and that interest due November 1st, 1875, had not been paid, and coupons due on that day were presented and payment demanded and refused, and that complainant is the holder of many of said third mortgage bonds (record, page 7, fols. 13 and 14).

6th. That said Pacific Railroad operated leased lines bound by the lien of above mortgage; that on June 29th, 1872, the Atlantic and Pacific Railroad Company, being without means of reaching St. Louis, and being without depot facilities in that city, leased the said Pacific Railroad, took possession of its lines, built the "Carondelet Branch Road," made improvements at St. Louis, and operated the roads as one; that all the mortgaged property is now in the possession of the Atlantic and Pacific Railroad Company, and the interests of creditors and all parties demand it shall be kept so (record, page 8, fols. 15 and 16).

7th. That the Atlantic and Pacific Railroad Company was liable for moneys due on the several obligations, and for a dividend declared on the stock, and had defaulted; that in pursuance of the lease the Atlantic and Pacific Company had issued obligations in the name of the said Pacific Railroad, on which it was liable; that both companies are in default and in arrears for taxes, and their commercial paper has been protested and are threatened with suits; that Pacific Railroad property is good for prior securities, but inadequate for third mortgage bonds, and a receiver should be appointed (record, pages 9 and 10, fols. 17 and 18).

8th. That complainant had applied, in behalf of himself and other holders of bonds, to defendants, Vail and Fish, to take proceedings to foreclose said mortgage, but no proceedings have been taken, and "some doubt is expressed whether under such

mortgage they have the right to institute any proceedings thereunder by reason of the non-payment of the interest due November 1st, 1875, *and for such reason prefer not to take such proceedings*, and your orator being apprehensive that his interests and the interests of other holders of like bonds may be seriously affected by delay in the institution of proceedings to foreclose said mortgage and to obtain possession of said property, has brought this action on his own behalf, and on behalf of all others similarly situated and holding like bonds, secured by said third mortgage, and has made said Vail and Fish parties defendant herein" (record, page 10, fol. 18). . .

Prayer that mortgage be foreclosed, and premises and property covered thereby sold, subject to prior liens, in one parcel, if the Court so determine, and if Court determines that all the property covered by the several mortgages above referred to, that all the property be sold, and net proceeds applied to payment of the several mortgages according to their priority, and that the said several defendants in this action, and all persons claiming under them, be forever barred (record, page 10, fol. 19).

Prays an account of the amount due on the said several mortgages, if necessary, and for a receiver (record, page 11, fol. 20).

This bill was filed on the 11th day of November, 1875 (record, page 35, fol. 63).

The various parties all appeared by their solicitors.

On January 8th, 1876, one Akers, owner of one hundred shares of the stock of the Pacific Railroad, filed a petition for leave to file an answer and cross-bill, alleging that the officers and directors, being themselves interested in the third mortgage bonds, did not intend to resist the foreclosure (record, page 14, fols. 26 and 27).

On February 7th, 1876, the Pacific Railroad appeared by *James Baker, its attorney*, and filed an answer admitting all the allegations of the bill, and concluding with this remarkable averment: "That

the execution and delivery of the said third mortgage bonds, and the mortgage to secure the same, was done in good faith, and for legal and proper purposes, without any fraud or malfeasance on the part of the board of directors or the stockholders of said company in the issue thereof, and constitute a legal and binding obligation on the part of this defendant to pay the same. But it says that it is informed that a portion of said stockholders claim that they are fraudulent and void, and that the directors of this defendant are guilty of fraud in issuing the same.

"Therefore this defendant asks this honorable Court to permit any of the stockholders aforesaid to become a party defendant to this suit upon a proper showing, and make such defense in the premises as they may see proper" (record, pages 16 and 17, fols. 28 to 31).

On February 16th, 1876, Cornelius K. Garrison and James Seligman, citizens of New York, and Thomas W. Pierce, a citizen of Massachusetts, filed a petition alleging that Garrison owned 1400, Seligman 347 and Pierce 50 of said third mortgage bonds, stating that allegations of bill were true and asking to *be joined with Ketchum* as complainants, and in his prayer for relief (record, page 17, fol. 32).

On April 3d, 1876, receivers were appointed (record, pages 20 to 24).

On April 26th, 1876, Akers and the County of St. Louis, as stockholders, on leave of Court, filed an answer and cross-bill alleging fraud in the issue of said third mortgage (record, pages 24 to 38).

On June 5th, 1876, defendants Lackland and Durkee and the Atlantic and Pacific Railroad Company, filed answers admitting the allegations of the bill, and saying, "they know of no reason why the prayer of complainants' bill should not be granted" (record, pages 38 and 39).

On the same day defendants Murdock and Clark (two of the trustees of the first mortgage), Morgan and Joseph Seligman (trustees of second mortgage),

Baker and Jesse Seligman (trustees of Carondelet Branch mortgage), filed an answer admitting allegations of bill, and asked "that the interests and rights of the holders of said bonds, and that the rights and powers of these defendants may be fully protected by this honorable Court" (record, pages 39 and 40).

On June 6th, 1876, defendants Vail and Fish filed their answer admitting allegations of bill, and submitting their interests and those of their bondholders to the Court (record, page 40, fol. 70).

On same day answer and cross-bill of Akers and County of St. Louis was withdrawn (record, p. 40, fol. 71).

On June 6th, 1876, a decree was entered, appearances of all parties by solicitors being waived, and abatement of suit as to Punnett by death, and "said cause coming on to be heard upon the bill of said complaint and the answers of said defendants, and the exhibits and proofs in this cause," and it appearing to the Court that mortgage was executed to Vail and Fish "*in trust to secure the payment of * * * four thousand bonds * * * dated July 10th, 1875, payable twenty years after date,*" with interest, &c. (as alleged in bill), then recites power of sale by trustees upon default in payment of interest for six months (as contained in mortgage) issue of bonds; substantially repeats the allegations of the bill as to the Income and Improvement Bonds; that no interest which became due November 1st, 1875, had been paid; that Ketchum owned 10 bonds, Garrison 1,400 bonds, Seligman 347 bonds, payment on the coupons of which 1807 bonds was demanded November 1st, 1875, and refused.

"And it further appearing to the Court that the interest of the said complainant *and the interests of other holders of like bonds may be seriously affected* BY DELAY IN THE INSTITUTION OF PROCEEDINGS TO FORECLOSE *the said mortgage, inasmuch as by the terms of said mortgage the said trustees are not authorized to sell the property secured by said mort-*

the execution and delivery of the said third mortgage bonds, and the mortgage to secure the same, was done in good faith, and for legal and proper purposes, without any fraud or malfeasance on the part of the board of directors or the stockholders of said company in the issue thereof, and constitute a legal and binding obligation on the part of this defendant to pay the same. But it says that it is informed that a portion of said stockholders claim that they are fraudulent and void, and that the directors of this defendant are guilty of fraud in issuing the same.

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"And it further appearing to the Court that the interest of the said complainant *and the interests of other holders of like bonds may be seriously affected* BY DELAY IN THE INSTITUTION OF PROCEEDINGS TO FORECLOSE *the said mortgage, inasmuch as by the terms of said mortgage the said trustees are not authorized to sell the property secured by said mort-*

gage until six months after demand made for the payment of said interest."

"Now, therefore, the Court being fully advised in the premises, and by the consent of all the parties to this suit through their solicitors of record, thereupon and in consideration thereof, it is ordered, adjudged and decreed as follows, to wit: That the said Pacific Railroad do stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises, property and franchises," and that the property be sold, &c.; that on such sale there shall be $200,000 cash paid and the balance, on confirmation of sale, in cash if made by some one not a bondholder or representative of bondholders, and if the purchaser be a bondholder * * * he shall pay $200,000 in cash and also the *pro rata* proportion which may be found due to the other bondholders, "*and the balance, after such cash payment, may be made in bonds*" (record, p. 45, fol. 78).

Under this decree the premises were sold and purchased by James Baker, the solicitor of the Pacific Railroad, on the 6th of September, 1876, and the sale was confirmed against the strenuous opposition of the stockholders on the 6th day of October, 1876 (record, page 47, folio 81).

Petitions were filed by stockholders to be allowed to come in, oppose confirmation, and to set decree aside as fraudulently obtained under collusion, and for want of jurisdiction in the court, but they were all denied (record, pages 47 to 55).

And against all protests the sale to the attorney and solicitor of record of the Pacific Railroad of all the mortgaged property was confirmed by the Court.

Analysis of the Proceedings.

We have, therefore, a suit commenced by a bondholder in behalf of all the bondholders, against the mortgagor and the trustees under the mortgage sought to be foreclosed, and also against the trustees under previous mortgages, exhibiting a mort-

gage to secure bonds upon which the principal sums are not due until 1895, alleging a default of less than four months' interest for three days, and that the bond and mortgage provided that after a default of interest for six months the mortgage gives the trustees the right to sell the mortgaged property at public sale; and that the trustees declare they have no right to foreclose the mortgage upon these facts, and asking the Court to foreclose the mortgage and sell the property either subject to previous mortgages or free and clear, and pay off those mortgages (which are not due and not in default).

Defendants all appear by solicitors, and either admit the bill or submit their interests to the judgment of the Court.

The Court by decree expressly finds the facts as above alleged in the bill, and *that there was no present right of foreclosure of the mortgage*, and then, by consent of the solicitors of the parties, adjudges that the defendant Pacific Railroad be foreclosed and debarred of its equity of redemption, and the mortgaged property sold; and that these unmatured bonds be received at par in payment for the property, the same as cash, and the property is sold under this decree to the attorney and solicitor of record of the defendant and appellant corporation, and the sale is confirmed by the Court.

Assignment of Errors.

First.

That the decree of foreclosure and sale and the order confirming the sale of the mortgaged premises are void for want of authority in the solicitor to consent to the same.

Second.

That the decree of foreclosure and sale and the order confiming the sale of the mortgaged premises are void for lack of power in the Court to grant the said decree upon the record presented.

Third.

That the decree of forclosure and sale and the order confirming the sale of the mortgaged premises are void for want of jurisdiction of the suit in the Circuit Court of the United States, which granted it, upon the record presented.

Fourth.

That the decree of foreclosure and sale is erroneous and void, in that no definite amount nor any amount is found due by the said decree or in the proceeding upon which it is based.

Fifth.

That the decree of foreclosure and sale is erroneous and void, in that it allows no time for the payment of the debt and the redemption of the estate, but is final and conclusive in the first instance.

Sixth.

That the decree confirming the sale of the mortgaged premises to Baker is erroneous and void, in that the said Baker was the solicitor of record in the suit for the appellant and defendant, the Pacific Railroad, and was incapacitated from purchasing the said premises.

We will first consider the appealable character of the said decrees in the United States Courts, and afterwards the errors assigned.

First.

The Supreme Court of the United States, upon the question of appeals, is governed by the Constitution and the provisions of the acts of Congress, not by the practice of other common-law and equity courts.

The United States Constitution, article III, section 2, subdivision 2, provides:

"In all the other cases before mentioned" (that is, all the cases mentioned in subdivisions of this section except those affecting ambassadors, public

ministers and consuls, and those in which a State shall be a party), "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Section 692 of the U. S. Revised Statutes provides that:

"An appeal shall be allowed to the Supreme Court from *all final decrees of any Circuit Court* * * * in cases of equity and of admiralty and maritime jurisdiction, when the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars; and *the Supreme Court is required to receive, hear and determine such appeals.*"

"The right of appeal being conferred by act of Congress, the erroneous refusal by District Court cannot deprive a party of that right, and only imposes on the party the burden of moving the Circuit Court to allow it, and on the Circuit Court the duty of directing that the clerk enter it."

The Enterprise, 2 Curtis Ct. C. & R., 317.

The distinction between the practice of this Court and other common-law and equity Courts is distinctly shown in the case of judgments by default, which are not appealable according to the practice of the latter.

Appeals are allowed from decrees entered by default in the Supreme Court.

Masterson vs. Howard, 18 Wall., 99.
Ex parte Jordan, 4 Otto, 248,
O'Hara vs. McConnell, 3 Otto, 150.
McAllister vs. Kuhn, 6 Otto, 87.

Also from consent decrees.

Kennedy vs. Georgia State Bank, 8 How., 612.

Second.

But if we admit that consent decrees are not appealable. THIS IS NOT A CONSENT DECREE.

The essential idea of a consent decree, the idea which renders it non-appealable is that it is a contract not a judgment. *It is supposed to be a contract between the parties to the suit* simply registered in the Court. As the parties and not the Court are responsible for it, the Court will not undertake to revise it or correct its errors. It is enough for the Court to correct its own errors without undertaking to correct the *mutual voluntary errors* of its suitors. We submit in this case, however, that the errors complained of on this appeal are not the errors *of the parties*, but are the errors of the Court and its officers. These the Court is bound to correct.

In brief our argument is this. Admitting that we are bound and cannot appeal from any part of this decree, if any such there be, to which we have consented, we can appeal from what we have not consented to, and in this case we have never consented to this decree as entered at all, and consequently its entire vitality is derived from the sanction given it by the Court. The Court could not vitalize it in that way, and it is not only erroneous but absolutely void on the record.

Your attention is asked to the following considerations:

(1) A decree rendered by consent is not, legally speaking, a judgment. It is a mere registry of an agreement. It decides nothing.

Corning vs. McCullough, 1 N. Y., 75.
People vs. Corning, 2 N. Y., 15.
Earl of Bandon vs. Bechu, 3 Cla. & F.,
Gaines vs. Relf, 12 Howard, 587.
Edgerton vs. Muse, 2 Hill (S. C.), 51.
Wadhams vs. Gay, Ill. Sup. Ct., Law Reg., July, 1875, 419.

In *Union Bank vs. Marvin* (3 Lousa. An. R., 34), J. Rost says:

"A decree thus rendered (by consent) is not, legally speaking, a judgment. A judgment is the decision of a controversy given by a Court of Jus-

tice between parties who do not agree. Consent decrees decide nothing. They merely authenticate private agreements, and render them executory between the parties. Their effects as to third persons are those of transactions made in authentic form."

In *Jenkins vs. Robertson* (Law R., 1 Scotch and Appeal Cases, 117), Lord Romilly said:

" When an action is brought and a verdict is obtained by the pursuer (plaintiffs) which is set aside, and an arrangement afterwards takes place, by which, in consideration of the payment of a sum of money, an interlocutor (judgment) is pronounced for the defenders, and the Court simply registers that interlocutor, without expressing any judicial opinion on the subject. I am of opinion that it is contrary to all principle to consider that such a transaction can be treated really as *res adjudicata* * * * * (the Court) has really exercised an administrative function by recording the interlocutor, which had been agreed to between the parties."

In *Vermont and Can. R. R. Co. vs. Vermont Cent. R. R. Co.* (50 Vt., 573), where a receiver originally appointed by the Court had gone on incurring large expenditures, with the consent of mortgagor railroads, the trustees of the mortgagees, and committees of the bondholders, made parties to the suit, and had obtained the sanction of the Court by entry of the order in each instance, the Court say:

" And though it may be repeating whas has already been sufficiently expressed, beginning with the compromise decree, that and the succeeding orders of the Court must be regarded as but the formal sanction of what was shown to the Court as having been agreed upon by the controlling parties prior to making applications for the orders, including the agreement that such application should be made and such orders obtained."

" *The force and effect of such orders result from the contract of the parties, and not from judicial*

judgment exercised by the Court. * * * * * *The form of judicial proceeding and the sanction of the Court cannot be held to control or essentially to modify or add to the force and effect which those arrangements, agreements and contracts would have if such form of judicial proceeding had not supervened upon them.*"

(2) One of the essential constituent elements necessary to the validity of every contract is a *mutual consent to its terms* by all the parties to the contract. *The minds of the parties must meet or there can be no contract.* Unless they met in this case there was and is no *consent* decree. It is not enough that the minds of the attorneys or solicitors should meet unless they have authority to bind their clients—the real parties to the suit. The vital question in every case is whether the *parties to the suit* have consented, whether *their minds* have met; and in determining this question in a case where the consent confessedly comes through an attorney or agent, the same test must be applied that the law always employs in determining the validity of agreements executed through attorneys or agents—that is, the attorney or agent must prove or show his authority to bind his principal, otherwise the presumption is that the principal is not bound.

(3). In the suit at bar the Pacific Railroad (of Missouri) never executed or assented to this agreement. The only execution or assent shown, is through its solicitor of record. The decree expressly says: "*By consent of all the parties to this suit through their solicitors of record, it is adjudged,*" &c. (record, page 44, folio 77).

As there is no other authority shown for binding the Pacific Railroad by this agreement than that of the solicitor in the suit, it is to be presumed there was none other.

An agent's authority must always be proved. The presumptions are against it. The proofs show a consent decree agreed to by the solicitor of record for the Pacific Railroad, the presumption therefore

is that he had the authority to represent and bind his client which ordinarily belongs to a solicitor and none other.

The authority of a solicitor of record in a suit is limited to the legitimate and regular conduct of that part of the suit in and for which he is employed. He is not a general agent for his client.

We suggest the following fundamental limitations or restrictions of the solicitor's powers or authority to bind his client in all court proceedings:

(*a*) He cannot go outside of or beyond the facts in the particular suit or case in which he is employed, as disclosed by the record, and bind his client.

To hold otherwise would place every client who employed an attorney in the unlimited grasp of that attorney. For instance, if a defendant was sued upon a note for five thousand dollars and employed an attorney to defend the suit, that attorney upon a record disclosing that state of facts could not consent to a judgment or decree for fifty thousand dollars and bind his client.

(*b*) He cannot depart from the canons of legal procedure and bind his client.

In a court of record there must be a record. There must be written pleadings as the basis of every judgment or decree. There must be certain facts stated, found, or admitted, and the measure and character of the relief granted must be determined by those facts—limited to what is appropriate to those facts.

"The presumption of authority based upon his general employment fades when he undertakes acts which are out of the usual range of an attorney's duties."

Wharton on Agency, § 588.
Harrow vs. Farrow, 7 B. Monr., 126.
Jewett vs. Wadleigh, 32 Me., 110.
Bank vs. Evans, 18 Miss. (10 S. & M.), 35.

Union Bank vs. Govern, 18 Miss. (10 S. & M.), 333.
Averill vs. Williams, 4 Denio, 295.
Webb vs. White, 18 Tex., 572.
Lovegrove vs. White, White L. R., 6 C. P., 253.

We call attention to the following references to cases where an attorney's acts in suits have been held unauthorized:

An attorney-at-law has no authority or right to make a compromise for his client.

In *Holker vs. Parker* (7 Cranch, 452), the Supreme Court, through Chief-Justice Marshall, say:

"Although an attorney-at-law, merely as such, has, strictly speaking, no right to make a compromise; yet a Court would be disinclined to disturb one which is not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case. But when the sacrifice is such as to leave it scarcely possible, with a full knowledge of every circumstance, such a compromise could be fairly made, there can be no hesitation in saying that the compromise, being unauthorized, and *being, therefore, in itself void*, ought not to bind the injured party."

See Davidson vs. Rozin, 23 Missouri, 387.
Walden vs. Bolton, 55 Missouri, 405.
Spears vs. Lederberger, 56 Missouri, 465.
Stokeley vs Robinson, 34 Penn. St., 315.
Huston vs. Mitchell, 14 Serg. & R., 307.
Dodds vs. Dodds, 9 Penn. St., 315.
Derwoot vs. Loomis, 21 Conn., 245.
Keller vs. Scott, 2 Sm. & M.
Vail vs. Jackson, 15 Vermont, 314.
Lewis vs. Garnage, 1 Pick., 347.

An attorney is not *dominus litis*. He has no power to give up the security of his client witout payment or express authority.

Terhune vs. Colton, 2 Stockt. Ch., 21.
Tankersley vs. Anderson, 4 Dessans, 45.

Nor to release sureties upon the claim of his client.

Savings Institution vs. Chinn, 7 Bush, Ky., 539.
Givens vs. Briscoe, 3 J. J. Marsh., 529. 539.
Kellogg vs. Gilbert, 10 Johns., 220.

Nor to discharge a *lien created* by levy of execution ("he has no power to do anything which would jeopardize the rights of his client").

Union Bank vs. Govern, 15 Sm. and M., 333.
Banks vs Evans, 10 Sm. and M., 35.
Benedict vs. Smith, 10 Paige, 126.

Nor to release a lien obtained by judgment, or to discharge any security resulting from his prosecution of the claim. And an honest belief that he is acting in his client's interest cannot supply the defect of authority to make such an arrangement.

Wilson vs. Jennings, 3 Ohio St., 528.

He may control the manner of conducting a cause, but cannot waive any substantial acquired right of his client.

Howe vs. Lawrence, 2 Zabr., 99.

He cannot waive the right of inquisition.

Hadden vs. Clark, 2 Grant, 107.

Nor consent to a judgment against his client.

People vs. Lamborn, 1 Scam., 123.
Anderson vs. Sutton, 2 Duvall (Ky.), 480.
Dodds vs. Dodds, 9 Barr. (Pa.), 315.

He cannot admit in such a way as to bind his client's erroneous positions of law.

Mitchell vs. Cottin, 3 Flor., 136.
Harrow vs. Farrow, 7 B. Mon., 126.
Jewett vs. Wadleigh, 32 Maine, 110.
Webb vs. White L. R., 6 C. P., 253.

"He can do such acts incidental to action as affect the remedy, but not such as affect the cause of action."

Moulton vs. Bowker, 115 Mass., 36.

(4) *Whatever, therefore, there is in this decree that was not consented to by the parties to the suit is subject to an appeal, and to that extent at least the decree is appealable.*

It is analagous to a judgment by default which is ordinarily not appealable, and is in this respect like a consent decree.

"Upon a writ of error to reverse a judgment by default, such defects in the declaration or complaint as could have been taken advantage of before judgment by general demurrer may be brought under review."

McAllister vs. Kuhn, 6 Otto, 87.

We have an instance directly in point of Court revising a consent decree on appeal, as far as questions of power and validity were concerned, in

Vermont & Canada R. R. Co. vs. Vt. Cen. R. R., 50 Vermt. R., 573.

Also of an appellate court passing upon a consent decree, so far as not assented to, in

Sage vs. Central R. R. of Iowa, 9 Otto, 334.

(5) This decree is appealable because it raises a question of the *power* of the Court and its officers to bind the parties, under the practice of the Court, to this decree upon this record.

A question of power is like a question of jurisdiction, and is always appealable.

Tilton vs. Beecher, 59 N. Y., 176.
O'Hara vs. McConnell, 3 Otto, 150.

"When an inferior court, sitting as an appellate tribunal, renders judgment in a cause in which it

had not legally acquired jurisdiction, such judgment may be reviewed on appeal, although, if jurisdiction had been acquired, the judgment had been final and conclusive."

Mears vs. Renares, 33 Md., 246.

Third.

The decree of foreclosure in this suit was absolutely void for want of authority in the solicitor to consent to the same.

(1) Because, as the record shows, it was an attempt, by the consent of the solicitor of record, illegally to give away all appellant's rights in all the property it owned.

The theory of a corporation is that the State confers certain privileges or franchises, as they are called, upon the body corporate, and that in consideration thereof, that body holds them as a personal trust which it must exercise for the benefit of the public while it exists.

This principle has been carried to such an extent by the courts of some of our States that they deny the power of a corporation to part with its entire property, on the ground that such a parting would prevent it from exercising its franchises.

See Abbot vs. Hard Rubber Co., 33 Barb., 578.

Troy and Rutland R. R. Co. vs. Kerr, 17 Barb., 601.

Justice Story says, in *Beaston vs. Farmers' Bk.* (12 Peters, 102):

"Independent of some special and positive law or provision in its charter to such an effect I do exceedingly doubt if any such corporation, at least without the express consent of all the corporators, can rightfully dispose of all its property by such a general assignment so as to render itself incapable

in future of performing any of its corporate functions."

See also Hays vs. Ottawa, O. F. R. Y. R. R. Co., 61 Ill., 422.

These cases show how jealous the courts are of approving anything that results even indirectly in a non-user of a franchise by a corporation. For, although corporations, like individuals, have a general undisputed right to sell their property, these cases maintain that the right cannot be exercised when it effects a discontinuance of a franchise without legislative consent.

(2) Because it was an attempt, by consent of the solicitor of record, to give away all appellant's rights in the property it owned in defiance of all the facts in the case as disclosed by the record.

The authority of a solicitor of record in a suit is necessarily circumscribed by the facts of the suit in which he is employed. He cannot go outside and voluntarily give away other rights of his client not involved in that suit because he happens to be employed by that client.

Marburg vs. Smith, 11 Kansas, 554.
Munday vs. Vail, 34 N. J. L. R., 418.
Strauss vs. Francis, L. R. 1, 2 B., 379.
Ex parte Wenham, 21 W. R. (1875), 104.
Holker vs. Parker, 7 Cranch, 436.

The facts in the case at bar are undisputed. The complainant has alleged a mortgage made to secure bonds, the principal of which was not due until 1895, and the only remedy for default in payment of interest was to sell the property at public sale *after the default had continued six months*, and had also alleged *that the trustees under the mortgage refused to foreclose because that right would not mature for six months*. These allegations were admitted by the answers and expressly found true by the decree. Certainly these facts do not warrant the solicitor of record in the suit to bind his client

by consent to any decree in foreclosure beyond what was required to pay defaulted interest. They do not authorize him to give away all his client's property without affording him any opportunity to redeem.

(It must also be remembered that this company was in the hands of lessees who controlled it and had contracted this indebtedness, and the company had not the usual knowledge of a debtor who creates a debt and is presumed to be conversant with its amount.)

Nor do the facts above recited authorize the attorney or solicitor to ignore all the facts of the case as shown in the record and to defy all rules of practice and all precedents; to make debts due that were confessedly not due, and to provide for their payment or satisfaction in the decree; to find that there was no right of foreclosure and then to order a strict foreclosure and sale afterwards.

(3.) Because it was an attempt by consent of the solicitor of record in defiance of all rules of procedure known to the law, and without any facts to base a judgment on adequately alleged or found, to enter a decree unknown to the law—a decree of annihilation against the appellant—a *castigatque anditque*.

"The consent of parties cannot authorize the Court to revise a judgment of an inferior Court in any other mode of proceeding than that which the law prescribes."

Kelsey vs. Forsyth, 21 How., 85.
Mordecai vs. Lindsay, 19 How., 200.
Montgomery vs. Anderson, 21 How., 386.

The principle is applicable to Courts of original as well as appellate jurisdiction.

An attorney or solicitor is the agent of the party whom he represents within the legitimate limits of the suit, and his power to bind his client must be confined and limited to the regular proceedings in this suit. If he steps outside of the regular practice

and attempts to bind his party by proceedings not warranted by the canons of legal procedure, his act is utterly void. To admit any other rule would utterly destroy all the safeguards which the law puts about a party when he intrusts his case in the hands of a lawyer.

On a certain state of facts a party is legally entitled to certain rights and to have those rights determined by a certain order of legal procedure, and even if it were legitimate for an attorney or solicitor to settle those facts by consent or otherwise, and consent to any decree or remedy consistent with those facts: he certainly cannot ignore the facts when settled. If the record shows that the defendant has been guilty of petty larceny, the attorney cannot consent to have him guillotined and irrevocably bind his client by a consent decree to that effect.

"A decree, purporting to have been made *by consent*, determining the title in controversy in a suit between rival claimants to a mining claim differently from what had been adjudicated by a previous decree in the cause was held *utterly void* as a decree, because there were no allegations in the pleadings or record upon which to base it."

Kinney vs. Consolidated Va. Mining Co.,
4 Sawyer, 382.

In the suit at bar the Court could not adjudicate the payment of bonds confessedly not due, nor decree foreclosure for amount of bonds when the bill alleged and the decree found there was no right of foreclosure, and under the most liberal construction only stated facts enough to warrant a foreclosure for non-payment of arrears of interest.

We call attention to the following gross irregularities of practice, as exhibited in the record in the entry of this decree.

(*a*) *As to the debt adjudged to be due.*

The decree must bear one of two constructions. Either it altogether fails to find the amount of the debt due for which the property was to be sold, or

it decrees for the entire principal and interest of the bonds. In either event it is grossly erroneous and false.

First. An interlocutory decree in a suit for foreclosure directed the mortgagor to pay the sums due the complainants, *not specifying them.* Afterwards decree was made, reciting that mortgagor had failed to pay as ordered, and directed the sale of so much of the property as would pay to certain mortgagees a sum which did not appear from any part of the record to be the true sum. Held, both decrees were wholly erroneous and that the decree should have ascertained the exact sum and stated it.

Hopkins vs. Ward, 12 B. Mon., 185.
Cox vs. Wheeler, 7 Paige, 284.

The amount due on the mortgage is imperatively required to be found in the *nisi* decree.

Hazen vs. Ried, 30 Mich., 331.
Guy vs. Franklin, 5 Cal., 416.
Beville vs. McIntosh, 41 Miss., 516.
Wylie vs. McMakin, 2 Md. Ch., 413.
Graham vs. King, 15 Ala., 363.
King vs. Longworth, 7 Ohio, 522.
Wennwag vs. Brown, 2 Blackf., 457.

And this is precisely in accord with the practice in the English High Court of Chancery, which is the practice of the Circuit Court of the U. S.

Smith vs. Robinson, 17 E. L. & E., 450.
Bell vs. Carter, 19 E. L. & E., 56.

The reason of this is obvious and just; it enables the mortgagor to prevent an extinguishment of his equity of redemption, by paying the installment or sum adjudged to be actually due.

Rice vs. Cribb, 12 Wis., 179.
Peyton vs. Ayres, 2 Md. Ch., 64.
Mann vs. Richardson, 21 Pick., 355.
Lansing vs. Capron, 1 Johns. Ch., 617.
Fleming vs. Loutter, 6 Wall., 747.

Bronson vs. La Crosse R. R., 2 Wall., 312.
Mil. & Minn. R. R. vs. Loutter, 2 Wall., 440.

The right of the mortgagor to have restoration of his property on payment of the sum due and settled in the decree, is not a matter of discretion but of strict legal right.

R. R. Co. vs. Soutter, 2 Wall., 510.
R. R. Co. vs. Howard, 6 Wall., 752.

The decree herein recites that of the $4,000,000 of the issue of bonds sought to be foreclosed, a "portion" have been negotiated and "a number" still remain in the hands of the trustees; and that, "of *those outstanding*," the November 1 interest has not been paid. But what portion has been sold or exchanged and what number remain in trust, and how many remain outstanding is left wholly unrecited and indefinite.

In a case of such magnitude, involving such vast interests, it was sought by this collusive decree, without any reference to a master, even approximately to state the sum due, to instantly bar the equity of redemption by withholding from the decree any statement of the sum required to protect the equity from sale.

If the ordinary rule is as stated, how much greater reason for its rigid application in a case where not only the amount but the validity of the debt was questionable.

Second. It is claimed, however, that the decree is substantially a finding for the full principal and interest of the entire issue of bonds.

In this view, the decree is not only taken contrary to practice, but is so grossly unconscionable as to shock the sense.

The principal of these bonds does not become due by their terms until July 10, 1895. Nothing, either

in them or the mortgage, under any circumstances of default makes them due at any earlier date.

It is the ordinary case of an attempted foreclosure for interest only. In such cases, if the decree is enrolled for a larger amount than is actually due by the terms of the obligation, it is error, because it substantially alters the contract of the parties, and not within the scope of the defeasance.

Smith vs. Smith, 32 Ill., 202.
Rains vs. Mann, 68 Ill., 264.
Tompkins vs. Wiltberger, 56 Ill., 385.
Ames vs. Ames, 5 Wis., 160.

It has never been adjudged that for a failure to pay one of several installments, a court of equity will decree a conclusive foreclosure as to the whole property.

Caufman vs. Jayne, 2 B. Man., 204.
James vs. Fisk, 9 Sm. & M., 144.
Dufferin vs. Johnson, 1 Paige, 450.

The decree will either order so much to be sold as will satisfy the installment due, or will decree a sale *subject to the installments to become due thereafter.*

Mines vs. Moore, 41 Ill., 275.
Weiner vs. Hentz, 17 Ill., 259.
Bronson vs. LaCrosse R. R. Co., 2 Wall., 312.
Fleming vs. Soutter, 6 Wall., 747.

In no case is it tolerable to charge the equity as the price of redemption with a larger sum than is actually due. Any decree, therefore, declaring the principal of these bonds to be presently due, and to be redeemed against nineteen years before their maturity, is irregular and unconscionable.

(*b*) *The judgment did not conform to the case made by the bill.*

"It is well settled that a decree must conform to the allegations of the party as well as to his proofs."

Vattier vs. Hinds, 7 Peters, 273.
Crocket vs. Lee, 7 Wheaton, 522.
Carmal vs. Banks, 10 Wheaton, 181.

"The relief granted by the Court under a bill must be agreeable to the case made by the bill."

English vs. Foxall, 2 Pet., 595.
Boone vs. Chilles, 10 Pet., 177.
Hobson vs. McArthur, 16 Pet., 182.
Wilson vs. Graham, 4 Wash. C. Ct., 53.

"A decree setting aside a sale, when the complainant denies that there has been a sale, would involve a total disregard of the rules of pleading and evidence, and would be tantamount to granting relief in opposition to the allegations of the bill."

Charles v. Dubose, 29 Ala., 367.

"No admissions in answer to a bill in chancery can, under any circumstances, lay a foundation for relief under any specific head of equity, unless it be substantially set forth in the bill."

Jackson vs. Ashton, 11 Peters, 229.
Byrne vs. Romaine, 2 Edw. Ch., 445.

"Judgment cannot be obtained for an amount about to become due,"

Christian vs. Rahlman, 24 La. Ann., 50.

"The Court must act upon the property according to the rights that appear upon the record."

Munday vs. Vail, 34 N. J. L. R., 420.
Gifford vs. Hort, 1 Sch. & Lef., 408.
Gove vs Sackpole, 1 Dow., 30.
Colclough vs. Steiner, 3 Bligh. R., 186.

(c) *It provided no time, place or terms of redemption.*

This is the essence of foreclosure proceedings, and not a matter of discretion. Even though it be expressly agreed in the defeasance there shall be no redemption. Chancery will relieve and hold such a stipulation void as being unconscionable.

Story Eq., §§ 1,008, 1,009.

That a period or short day shall be allowed in the decree for redemption, is held to be a matter of right, an omision of which is good ground for reversing the decree.

Woodward vs. Fitzpatrick, 2 B. Man., 61.
2 Hilliard on Mortgages.
Harkins vs. Forsyth, 11 Leigh., 294.
Jones vs. Bosworth, 3 Bland., 194.
David vs. Graham, 2 H. & G., 94.
Farwell vs. Barber, 50 Ill., 274.
McIntyer vs. Whitfield, 13 Sm. and M., 88.

The equity rules adopt the English practice. Coote thus states it :

"The case is referred to a master, and a decree is rendered to pay the debt and costs in six months after the report. The master makes a report, fixing the day of payment, and his report is confirmed. If the defendant then makes default, the mortgagee may have an absolute foreclosure."

Coote on Mortgages, p. 566.
Bell vs. Carter, 19 E. L. & E., 56.
Smith vs. Robinson, 17 E. L. & E., 450.

By ordinances 37, 10, six calendar months are given for redemption, after the chief clerk's certificate.

Seton on D., 364, No. 1.

"The decree *nisi* in this case, required, in effect, the payment to be made *instanter*, and nothing in the record is furnished to justify such extreme rigor. The giving day is not a mere matter matter of form."

Richardson vs. Parrott's Heirs, 7 B. Mon., 386.

This Court, in *Clark vs. Reyburn* (8 Wall., 318), censured such unconscionable and unknown practice as is disclosed in this record, holding that "a decree of strict foreclosure which does not find the

amount due, which allows no time for the payment of the debt and the redemption of the estate, and which is final and conclusive in the first instance, cannot be sustained."

And in *Bronson vs. La Crosse R. R. Co.* (2 Wall., 312), established the precedent of a year's time to pay even an installment of interest.

This decree is open to all the objections for which the Court declared that, in *Clark vs. Reyburn*, to be "fatally defective."

Without naming any certain sum, or any officer or place to whom or where it is to be paid, to save the estate, without any decree *nisi*, or short day named, it adjudges that "the said Pacific Railroad DO STAND ABSOLUTELY DEBARRED AND FORECLOSED of and from all equity of redemption of, in or to the said mortgaged premises," &c.

No such decree ever has been or ought to be sustained in a court of chancery.

This consent decree was therefore absolutely void as against the Pacific Railroad. It did not bind the corporation. In fact it is doubtful whether the officers and directors of the corporation could validly assent to this decree without a vote of the stockholders of the company. The rights of the parties were determined by the terms of the contracts, to wit: the bond and mortgage. It required the vote of the stockholders to issue valid bonds and mortgage.

1 Wagner's Statutes, 315.

The authority given the directors by the stockholders to issue these bonds had been exercised and was exhausted.

The officers could not revoke or alter that exercise of authority once completed. If the officers and directors of the company could validly assent and make a new agreement to obtain relief in equity on the basis of such agreement, made after the commencement of the suit, the agreement must be brought before the Court by a supplemental bill.

Hobson vs. McArthur, 16 Peters, 182.

Fourth.

There was no power in the Court to grant this decree upon the record presented, by consent or otherwise.

"The agreement of parties (much less attorneys) cannot authorize the Court to revise a judgment of an inferior court in any other mode of proceeding than that which the law prescribes."

Kelsey vs. Forsyth, 21 Howard, 85.
Mordecai vs. Lindsay, 19 Howard, 200.
Montgomery vs. Anderson, 21 Howard, 386.

This principle applies to all courts of original as well as of appellate jurisdiction.

"Though the Court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the Court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel, or personal tort, the Court cannot order in the case a specific performance of contract. If the action be for possession of real property, the Court is powerless to admit in the case the probate of a will. *The judgments mentioned given in the cases supposed would not be merely erroneous; they would be absolutely void*, because the Court in rendering them would transcend the limits of its authority in these cases." * * * * * * * *

"A departure from the established modes of procedure will often render the sentence void. Thus, the sentence of a person charged with felony upon conviction by the Court without the intervention of a jury would be invalid for any purpose. *The decree of a court of equity upon oral allegations*

without written pleadings would be an idle act of no force beyond that of an advisory proceeding of the Chancellor, and the reason is that the Courts are not authorized to exert their power in that way."

Windsor vs. McVeigh, 3 Otto, 274.

Where a decree is founded on the Master's report which ascertains debts not covered by the bill and omits entirely those which are, it is error, although no exception was taken to the report, as the decree appears on its face to be wholly disconnected with the matter of the bill.

McGowan vs. Branch Bank of Mobile, 7 Ala., 823.

"It is a rule in equity not affected by the Code of Procedure, that a party must recover according to the case made by his complaint, or not at all. *Secundum allegata* as well as *probata*. No decree can be made in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged, although they may be apparent from some parts of the pleadings and evidence."

Rome Exch. Bank vs. Eames, 4 Abb. App. Dec., 83.

A DECREE IN EQUITY ADJUDICATING MATTERS ENTIRELY OUTSIDE OF THE ISSUE PRESENTED IN THE RECORD IS VOID, AND WILL BE TREATED AS A NULLITY, EVEN IN A COLLATERAL PROCEEDING.

Munday vs. Vail, 34 N. J. L., 418.

" A defect in a judgment, arising from the fact that the matter decided was not embraced within the issue, has not, it would seem, received much judicial consideration, and yet *I cannot doubt that upon general principles such a defect must avoid a judgment.*

"It is impossible to concede that because A & B are parties to a suit, that a court can decide any matter in which they are interested, whether such

matter be involved in the pending litigation or not. Persons, by becoming suitors, do not place themselves for all purposes under the control of the Court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises. If, in an ordinary foreclosure case, a man and his wife being parties, the Court of Chancery should decree a divorce between them, it would require no argument to convince every one that such decree, so far as it attempted to affect the matrimonial relation was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstance that the point decided was not within the substance of the pending litigation."

Ch. J. Beasley in Munday vs. Vail, 34 N. J. L. R., 418.

No decree can be made in favor of a complainant on grounds not stated in his bill.

Bailey vs. Rider, 10th N. Y., 363.
Forsyth vs. Clark, 3 Wend., 537.
James vs. McKernan, 6 Johns. 543.
Lindsay vs. Lynch, 2 Schoules & Lefroy, Irish.
Willis vs. Evans, 2 Ball & Beatty, Irish, 228.
Legh vs. Haverfield, 5 Vesey, 542.
Pilling vs. Armitage, 12 Vesey, 78.
Byrne vs. Romaine, 2 Edw. Ch., 445.
Lytle vs. Pope, 1 B. Mon. (Ky.), 266.

A judgment will be set aside on motion, if entered under power of attorney before the obligation becomes due.

Smith vs. Harkwell, 4 McLean, 206.

We will now consider the question of the jurisdiction of the United States Courts presented by this suit.

The following are the jurisdictional averments of the bill:

" Humbly complaining shows unto your Honors

your orator, *George E. Ketchum, a citizen of the State of New York*, who brings this bill of complaint against the Pacific Railroad, a corporation created under and by virtue of the laws of the State of Missouri, and against the Atlantic and Pacific Railroad Company, a corporation created and organized under and by virtue of an Act of Congress of the United States, approved July 27, 1866, and at the several times hereinafter mentioned engaged in operating and maintaining a railroad in the State of Missouri aforesaid, and against James Baker, Rufus J. Lackland and Dwight Durkee, citizens of the State of Missouri, *Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett and Luther C. Clark, citizens of the State of New York.*"

The defendants appeared by solicitors, and a decree was entered by consent of solicitors of record, which, after finding "that the interest of the complainant and other bondholders may be seriously affected by delay in the institution of proceedings to foreclose the said mortgage, inasmuch as by the terms of said mortgage the said trustees are not authorized to sell the property secured by said mortgage until six months after demand made for the payment of said interest." Ordered, "that the Pacific Railroad do stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises," and that the property be sold.

Fourth.

By reason of the citizenship of the parties apparent on the record, the Circuit Court had no jurisdiction, under the Constitution and laws of Congress, to entertain this action or enter any decree whatever.

The Constitution limits the exercise of the judicial

power in these words: "The judicial power of the United States shall extend to * * * controversies between citizens of different States."

As the judicial power given to the Circuit Court by acts of Congress cannot extend beyond the limits prescribed for it by the Constitution, we will first consider the Constitutional provision and how far it has already been construed and its language interpreted by the Courts.

Mossman vs. Higginson, 4 Dallas, 12.
Hodgson vs. Bowerbank, 5 Cranch, 303.

History.

The confederation of States known as the United States had accomplished the War of Independence. Thirteen independent States had grown up under separate charters, animated by an intense jealousy of foreign domination of every description. Only the stern necessities of defense against a common foe, who threatened to overthrow them all in a common ruin, drove them into a union under the confederation, which abridged in the slightest degree the independence of their several State governments.

The Revolutionary war proved to the States that they had many things in common which called for union and demanded a united administration in behalf of all the States and all the people. It also proved that the confederation as then existing was an utter and entire failure. It was not self-supporting. It acted through the States in every essential particular. It had a legislative but no executive or judicial department. Its legislative department from necessity advised laws rather than made them. It sometimes attempted executive functions through its officers, but their success was entirely dependent upon the co-operation of the State governments.

After the war, the question which perplexed the public was how to get the advantages of union

without impairing the integrity and the independence of the several States in their local affairs.

On February 21, 1787, a preamble and resolution was passed by the old Congress, which recited that whereas defects existed in the confederation, Resolved, that it is expedient that a convention of delegates be held "for the sole and express purpose of revising the articles of confederation."

The convention met May 14, 1787. The journal of the convention contains the following references to the judiciary.

Charles C. Pinckney, on May 29, 1787, offered a draft of a constitution. Article IX is as follows:

"The Legislature of the United States shall have the power and it shall be their duty to establish such courts of law, equity and admiralty as shall be necessary.

"The judges shall hold their office during good behavior, and receive a compensation which shall not be increased or diminished during their continuance in office. One of these courts shall be termed the Supreme Court, whose jurisdiction shall extend to all cases arising under the laws of the United States, or affecting ambassadors, other public ministers or consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction. In cases of impeachment, affecting ambassadors and other public ministers, this jurisdiction shall be original, and in all other cases appellate."

"All criminal offenses (except in cases of impeachment) shall be tried in the State where they shall be committed. The trials shall be open and public, and be by jury."

Journal of the Convention, p. 78.

Edmund Randolph submitted several resolutions which, on June 19, were agreed to in the following shape as regards the judiciary:

"13. That the jurisdiction of the National Judiciary shall extend to cases which respect the collec-

tion of the national revenues, impeachment of any national officers, *and questions which involve the national peace and harmony.*"

Adopted, p. 188.

On July 23 and 26 all the resolutions adopted by the convention and drafts of constitutions were referred to a "committee of detail," appointed for the purpose of reporting a constitution.

This committee consisted of five members: John Rutledge (afterwards appointed Chief Justice of the U. S. Supreme Court in July, 1795), Oliver Ellsworth (Chief Justice of said Court from 1796 to 1802), James Wilson (an Associate Justice of that Court at the time of its formation), and two other members, Nathaniel Gorham and Edmund Randolph. On August 6th this committee reported a draft containing the following provision as to the judiciary:

ART. XI.

"SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as shall, when necessary, from time to time, be instituted by the Legislature."

"SEC. 2. The Judges of the Supreme Court and of the inferior courts will hold their offices during good behavior. They shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office."

"SEC. 3. The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting ambassadors, other public ministers and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two or more States (except such as shall regard territory or jurisdiction); between a State and citizens of another State, *between citizens of different States,*

and between a State or the citizens thereof and foreign States, citizens or subjects."

"In cases of impeachment, cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, this jurisdiction shall be original. In all other cases before mentioned it shall be appellate, with such exceptions and under such regulations as the Legislature shall make. The Legislature may assign any part of the jurisdiction above mentioned, except the trial of the President of the United States, in the manner and under the limitations which it shall think proper, to such inferior courts as it shall constitute from time to time."

Journal, p. 226.

It will be seen that under a resolution giving the National Judiciary jurisdiction to decide cases arising under laws passed by the General Legislature and *such other questions* as involve the national peace and harmony, the substantial language of Article III. of our present Constitution was framed by this eminent committee of five. They originated the phrase, "controversies between citizens of different States."

It is a singular fact that the same Oliver Ellsworth who figured on this committee, afterwards, as United States Senator, drafted the Judiciary Act of 1789, and then with Rutledge and Wilson, other members of the same committee, and with John Blair and William Patterson, who were fellow-members of the Constitutional Convention and afterwards Associate Justices of the same Supreme Court until 1807, and with John Jay, one of the authors of the "Federalist," and the first Chief Justice of that Court, he assisted in giving that Act and that phrase of the Constitution the interpretation which it has since held in spite of the changes of phraseology employed in the acts of Congress.

We might naturally suppose that they knew what the Constitution meant when it said "controversies

between citizens of different States." Certainly their interpretations ought not to be disregarded unless the Court has the very strongest reasons for differing from them in judgment.

The Act of 1789, drafted, as we have said, by Chief-Justice Ellsworth, confers jurisdiction upon the Circuit Courts in these words:

Act of 1789, § 11. "The Circuit Courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity where an alien is a party or the suit is between a citizen of the State where the suit is brought, and a citizen of another State."

§ 12. "If a suit is commenced in any State Court against any alien, or by a citizen of the State in which the suit is brought, against a citizen of another State, and the matter * * exceeds * * $500, and the defendant shall, at the time of his appearance in such State Court, file a petition for the removal," &c.

Now, jurisdiction and judicial power are synonymous terms. They mean *the right to decide; the power of judgment.*

Grignon vs. Astor, 2 How., 338.

"The judicial power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the forms prescribed by law. It then becomes a case."

Osborne vs. U. S. Bank, 9 Wheat., 738.

A case, therefore, to which *the power* of judgment, under this provision of the Constitution, attaches in the United States Courts must be *a controversy between citizens of different States;* and a *suit* between citizens of different States, under the language of the Judiciary Act, must be a *controversy* between such citizens, or the *power of judgment* would not lie under the Constitution.

In Sewing Machine Co. cases (18 Wall., 585), the Supreme Court say:

"A suit by a plaintiff against a defendant must mean substantially the same thing, in a practical sense, as 'a suit in which there is a controversy between the parties,' as each provision includes the word suit."

It is to be presumed that the framers of the Constitution acted advisedly, and meant something by it, when they discarded the more usual word, "*suit*," and adopted the word, "*controversy*," and since, as we have seen, a suit between citizens, &c., of which the Court has jurisdiction, must be a controversy between those citizens, we naturally conclude that, although the suit must be a controversy, a controversy between citizens of different States is not always a suit between such citizens, otherwise there would be no sense in dropping the word "cases," which is identical with suits, and using the word "controversies" in the Constitution; and if the framers of the Constitution had intended that the United States Courts should take jurisdiction of all suits in which there was a controversy between citizens of different States, we must presume they would have said so.

Under the resolutions of the Constitutional Convention the committee were to draft a provision giving the judiciary of the United States the right to decide *such questions* as involved the national peace and harmony, and the committee reported a provision authorizing it to decide *controversies* with certain national characteristics, such as those between citizens of different States. But the Court cannot decide controversies unless they are embodied in a suit, and that suit must be so brought that it presents *a pure and clean controversy between citizens of different States.* Otherwise the Court will not decide it. The reason for this will appear in the fourth and fifth points of this brief.

The language of the Judiciary Act is "a suit between a citizen of the State where the suit is brought and a citizen of another State."

The Court has always construed this language as

equivalent to *suits between citizens of the State where the suit is brought and citizens of other States*, which is the same as *suits between citizens of different States*, with the limitation that one of the parties, plaintiff or defendant, must be citizens of the State where the suit is brought.

But they say in every case the *suit* must be a clean controversy between such citizens.

In *Connolly vs. Taylor* (2 Peters, 556), bill was filed in District of Kentucky by aliens and by citizens of Pennsylvania against citizens of Kentucky and one citizen of Ohio.

The Court say: "Had the cause come on for hearing in this state of the parties a decree could not have been made in it for want of jurisdiction."

"The substantial parties are aliens and the Court had original jurisdiction between them and all the defendants, but they prevented the exercise of this jurisdiction by uniting with themselves a person between whom and one of the defendants the Court cannot take jurisdiction. Had the cause come on for hearing in this state of the parties a decree could not have been made for want of jurisdiction"

In *Vattier vs. Hinde*, (7 Peters, 252), the same practice is sanctioned.

In *Wood vs. Davis* (18 How., 467), Davis, a citizen of Illinois filed a bill in State Court of Illinois against Wood, Abbott & Co., citizens of Pennsylvania, and four other nominal parties, citizens of Illinois. Wood, Abbott & Co. appeared and under Judiciary Act removed the suit into the Circuit Court for Illinois. Jurisdiction was sustained on the ground that the four defendants from Illinois were no longer parties.

In *Strawbridge vs. Curtiss* (3 Cranch, 267), bill filed in Massachusetts by citizens of Massachusetts *vs.* three citizens of that State and Curtiss, citizen of Vermont. Court refused to take jurisdiction.

In *Course vs. Stead* (4 Dall., 22), the original bill described the parties so as to give the Court jurisdiction. A supplemental bill was filed making a

new party without stating his citizenship. Decree was entered in the Circuit Court with the pleadings in this condition.

This decree was reversed because the Court had no jurisdiction.

In *Coal Co. vs. Blatchford* (11 Wall., 172), Blatchford, a citizen of New York, and Newman, citizen of Pennsylvania, filed a bill in Pennsylvania against Coal Company, a corporation of Pennsylvania, for foreclosure of mortgage made by defendant to them as trustees for bondholder.

Decree was reversed for want of jurisdiction.

Gaylord vs. Kelshaw (1 Wall., 81), Gaylord, a citizen of Ohio, filed a bill in Indiana against Butterworth, a citizen of Indiana, and Kelshaw, whose citizenship was not averred.

Suit was dismissed for want of jurisdiction.

In *Barney vs. Baltimore City* (6 Wall., 280), plaintiff, a citizen of Delaware, sued defendant, a Maryland corporation, and others, citizens of Maryland, also holding interests in the litigated property for citizens of the District of Columbia, in Circuit Court for Maryland.

The suit was dismissed for want of jurisdiction.

In *Horn vs. Lockhart* (17 Wall., 570), where citizens of Texas sued citizens of Alabama, in Alabama Circuit, making citizens of Texas, defendants, as to whom suit was dismissed, before decree, the Court sustained the jurisdiction.

In *Godfrey vs. Terry* (7 Otto, 178, Terry), a citizen of Virginia, filed a bill in South Carolina against a Receiver, Directors and Stockholders of a South Carolina corporation.

Held, Court had no jurisdiction.

In *Kendig vs. Dean*, 7 Otto, 423, Kendig, a citizen of Tennessee, sued Dean, a citizen of Ohio, in Tennessee, for stock in a Tennessee corporation which was not made a party to the suit.

Held, that the Court had no jurisdiction, because there was an inevitable controversy in the suit between citizens of the same State.

The doctrine of all these cases is that the suit, as presented to the Court for the exercise of its judicial power, must present a clean and apparent controversy between citizens of different States, or the Court cannot decide it.

Under date February 28, 1839, Congress passed the following Act, (5 Stat. at Large, 321):

"Where, in any suit at law, or in equity, commenced in any Court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the Court to entertain jurisdiction and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer, and the non-joinder of parties who are not so inhabitants, or found within the district shall constitute no matter of abatement or other objection to said suit."

In *Louisville Railroad Co. vs. Letson*, (2 How., 556), it is said: "This law was passed exclusively with an intent to rid the Courts of the decision in the case of Strawbridge vs. Curtiss."

This act has been held by implication to confer jurisdiction upon the Court over a controversy between citizens, neither of whom were of the State where the suit is brought, provided they voluntarily appear in such suit.

Jones vs. Andrews (10 Wall., 327), Jones, a citizen of Georgia, sued Andrews, a citizen of New York, and Reed and Bryson, citizens of Tennessee, in Tennessee, and Andrews moved to dismiss because the controversy, as between him and Jones, was not between a citizen of the State where the suit was brought and a citizen of another State. Jurisdiction sustained.

Under this act, therefore, the Circuit Courts had jurisdiction of controversies between citizens of different States where there was voluntary appearance.

They also held that the Court might make a decree in suits not only where *proper* parties were out of the jurisdiction, as in *Union Bank vs. Stafford* (12 How., 327), but even when the suit was upon a joint contract, and one of the joint contractors was out of the jurisdiction, or would oust the jurisdiction.

Clearwater vs. Meredith, 21 How., 491.
Insbuch vs. Farwell, 1st Black., 570.

But they have always held in every reported case that the Court cannot take jurisdiction of a suit under that act if an indispensable party was without the jurisdiction, or would defeat the jurisdiction.

Shields vs. Barrow, 17 How., 130.
Coiron vs. Millandon, 19 How., 113.
Barney vs. Baltimore City, 6 Wall., 280.
North. Indiana R. R. vs. Mich. Cen. R. R., 15 How., 233.
Kindig vs. Dean, 7 Otto, 423.

In *Ober vs. Gallagher* (3 Otto, 199), Ch. J. Waite says: "The Act of 1839 gave right to sue a citizen of another State served with process in the State where suit was brought."

"*If, however, an indispensable party (defendant) was a citizen of the same State with the plaintiff, the jurisdiction would be defeated, because the controversy would not be between citizens of different States, and thus not within the judicial power of the United States, as defined by the Constitution.*"

Act of 1866, July 27, 14 Stat., 306, is as follows: "If, in any suit already commenced, or that may hereafter be commenced in any State Court * * by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the sum of $500, exclusive of costs,

to be made to appear to the satisfaction of the Court, a citizen of the State in which the suit is brought is, or shall be, a defendant, and if the suit, so far as it relates to the alien defendant, or to the defendant who is a citizen of a State other than that in which the suit is brought, is, or has been instituted or prosecuted for the purpose of restraining or enjoining him, or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then, in every such case, the alien defendant, or the defendant who is a citizen of a State other than that in which the suit was brought, may file petition," &c., for the removal of the cause as against him.

This Act substantially uses the language of the Judiciary Act, *i. e.*, "a suit by a citizen of the State in which the suit is brought against a citizen of another State;" but it expressly sanctions the separation of *the controversy between citizens of different States* from the suit and its transfer to the United States Court, provided it can be decided, so far as it concerns him (the non-resident defendant), without the presence of the other party.

Under this Act the Court decided, *Gardner vs. Brown* (21 Wall,) 36, a suit commenced by Brown, a citizen of Tennessee, in State Court of Tennessee, against Gardner, a citizen of New York, and Walker, a citizen of Tennessee, for the foreclosure of a deed of trust made by Gardner to Walker to secure notes of Gardner to Vassar. Brown was administrator of Vassar's estate. Gardner petioned for removal under Act of 1866.

Jurisdiction refused on the ground that Walker was an indispensable party, or, in the language of the Act, the suit could not be determined, so far as it concerned Gardner, without the presence of Walker.

The Act of March 2d, 1867, was passed as an amendment to Act of July 7th, 1866, and is as follows: "Where a suit is now pending or may here-

after be brought in any State Court in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of $500, exclusive of costs, such citizen of another State, whether plaintiff or defendant, if he will make and file in such State Court an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State Court, may * * * file a petition," &c., for removal of that suit.

In this Act Congress first uses the term "suit in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State," which in the sewing machine companies' cases, the Court say, means substantially the same as a suit between those parties.

In *Gaines vs. Fuentes* (2 Otto, 10), the Court say: "The Act (of 1867) *covers every possible case* involving controversies between citizens of the State where the suit is brought and citizens of other States if the matter in dispute, exclusive of costs, exceeds the sum of $500."

In Sewing Machine Companies' cases (18 Wall., 553), a citizen of Massachusetts filed a bill, in State Court of Massachusetts, against a citizen of Connecticut, a citizen of New York and a citizen of Massachusetts, upon a joint liability; the citizens of Connecticut and New York petitioned for removal under the Act of 1867.

Certainly this was *a suit* within the express terms of the statute, in which there was a controversy between a citizen of the State in which the suit was brought and a citizen of another State, and the citizen of another State filed the affidavit, and if the Court had the constitutional power of taking jurisdiction in such a case, the language of the Act was sufficient to confer jurisdiction over this suit, and yet the Supreme Court denied the jurisdiction of the United States Court.

The suit was not a clean controversy between citi-

zens of different States, and the Act attempted to give the Court jurisdiction of the suit.

In *Vannevar vs. Bryant*, (21 Wall., 41), plaintiff and four of the defendants were citizens of Massachusetts, where suit was brought; three defendants were citizens of Maine, and one of Missouri.

Suit was for damages for a personal injury to plaintiff, inflicted by a servant of defendants on a steamboat which they owned. The three citizens of Maine attempted to remove the suit into the United States Court, and the Supreme Court say it is governed by the Sewing Machine Company cases, and denied jurisdiction. The following decisions also illustrate this Act:

Knapp vs. R. R. Co., 20 Wall., 117.
Gaines vs. Fuentis, 2 Otto, 10.
Hurst vs. Atlantic R. R. Co., 3 Otto, 71.
Amory vs. Amory, 5 Otto, 186.

Under all these acts the Supreme Court has, without an exception, interpreted the word "between" as meaning "exclusively between." When Congress said, in the Judiciary Act, that the Circuit Court shall have cognizance of *all* suits where the suit is between a citizen of the State where the suit is brought and a citizen of another State, they necessarily called for a definition of that word "between." It is the only qualitative word in the sentence. The Court thereupon declared that a suit between a citizen of the State where the suit is brought, and a citizen of another State, is only a suit where the plaintiffs or defendants are all citizens of the State where the suit is brought, and the other parties to the suit are all citizens of other States. They did not limit the suit to a single citizen on each side, nor did they confine the controversy to a *citizen* or *citizens* of the State where suit is brought and a citizen or citizens of *one other* State; but they have always maintained, in language that cannot be misunderstood, that a suit in which there was a plaintiff and a defendant, citizens

of a common State, could not be a suit between a citizen of the State where the suit is brought and a citizen of another State. To be "between" it must be *wholly between—exclusively between.* They have stretched the language of this paragraph of the Judiciary Act in every other respect. They read *a citizen* as *citizens*, and *another* as *others*, but they have always read *between as strictly between.*

Under the Act of February 28, 1839, they stretched the jurisdiction of the Court, by implication, over suits where some of the defendants were citizens of the State where the suit was brought, and some of them citizens of other States, and the plaintiffs citizens of still different States, but under this act, and those of 1866 and 1867, they have ever maintained the integrity of that word, *between.* Of course this word must have the same meaning in the Constitution that it does in these acts of Congress. And the reason, beyond a doubt, of their unwavering adherence to this strict construction of this word, *between*, is that the same word is the real qualitative word in the section of the Constitution we are considering.

The Act of March 3, 1875 (18 Stat. at L., 470), provides as follows: "The Circuit Courts of the United States shall have original cognizance * * * of all suits of a civil nature at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of $500, * * * in which there shall be a controversy between citizens of different States."

"SECT. 2. That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State Court, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, * * * in which there shall be a controversy between citizens of different States, * * * either party may remove said suit into the Circuit Court of the United States for the proper district; and when in any suit mentioned in this section, there shall be a controversy which is wholly between citi-

zens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit nto the Circuit Court of the United States for the proper district."

It is difficult to see how the Court could take jurisdiction, either original or by removal, under the Act of 1875, of a suit in which there was a controversy between a citizen of the State in which the suit was brought and a citizen of another State (which is a controversy between citizens of different tates), with an indispensable plaintiff and defendant from the same State in the suit, and refuse such jurisdiction by removal under the Act of 1867.

The language of the two acts, so far as they describe the cases included within their provisions respectively, is nearly identical in its force and meaning with the limitation that, under the Act of 1867, one of the parties to the controversy must be a citizen of the State in which the suit is brought (see *Gaines vs. Fuentes, supra*).

Both acts speak of a suit in which there is a controversy between citizens of different States. (A controversy between a citizen of the State in which the suit is brought and a citizen of another State, is a controversy between citizens of different States). Both acts, in terms, confer jurisdiction over the suit, and not alone the controversy.

The principle which decided that the Court could not take jurisdiction in the sewing machine companies' cases, under the Act of 1867, must decide that the Court cannot take jurisdiction, under the Act of 1875, of a suit where indispensable parties, plaintiff and defendant, are from the same State—in other words, where the suit does not present a clean controversy between citizens of different States.

This is in accordance with Justice Story's interpretation of the Constitution, as construed by the Court. He says:

"There is a peculiar class of American cases

"which may give rise to an objection to the juris-
"diction, founded solely upon the limited pow-
"ers of the court of equity over the parties,
"and altogether independent of the subject
"matter of the bill. Under the Constitution
"and laws of the United States, the Circuit
"Courts have, with few exceptions, jurisdic-
"tion only in suits between citizens of differ-
"ent States. And this has been construed to
"require that all the parties on each side of the
"record should be citizens of different States,
"and should be expressly averred to be so in
"the bill. If there be no such averment, the
"objection will be fatal to the suit in every
"stage of the proceedings, and it may be taken
"advantage of by demurrer, as the Court will
"not take jurisdiction over the parties or the
"cause, unless it is apparent upon the face of
"the proceedings."

Story, Eq. Pl., § 492.

Fifth.

THE PRESUMPTION IS THAT THE LANGUAGE IN WHICH THE LAW-MAKERS RECASTS THE LAWS ON A GIVEN SUBJECT IS USED IN THE SENSE ALREADY FIXED BY JUDICIAL CONSTRUCTION, OR WITH SPECIAL REFERENCE TO THAT CONSTRUCTION.

Sewing Machine Companies' Cases, *supra*.

When, therefore, Congress used, in the Act of 1875, the very expression used in the Act of 1867, it must be presumed to have the meaning already given to that expression, and that the Legislature adopted the meaning with the expression.

It is the business of the Legislature to change the laws; of the Court, to fix them—determine them.

Sixth.

The averments of the record determine the question of the jurisdiction of all the United States Courts.

"The facts upon which jurisdiction of the Courts of the United States rests must in some form appear in the record of all suits prosecuted before them. To this rule there are no exceptions."

Ex parte Smith, 4 Otto, 455.

If there are not averments in the record *of facts* necessary to give the courts jurisdiction, it is fatal to the suit.

Bingham vs. Cabot, 3 Dallas, 382.
Turner vs. Erville, 4 Dallas.
Wood vs. Wagnon, 2 Cranch, 9.
Gold Washing and Water Co. vs. Keyes, 6 Otto, 99.
Godfrey vs. Ferry, 7 Otto, 171.
Washington County vs. Durant, 7 Wall., 694.
The Alicia, 7 Wall., 571.
Fisher's Lessee vs. Cockrell, 5 Peters, 248.

Acts of Congress and orders of the Court will not confer jurisdiction.

The Alicia, 7 Wall., 571.
The Monarch, 9 Wall., 504.

Consent of counsel will not confer it.

Brigham vs. Luddington, 12 Blatchford, 241.
Scott vs. Sandford, 19 Howard, 393.
The Lacy, 8 Wall., 307.
Cutler vs. Rae, 7 How., 729.

State laws cannot add to or abridge it.

Insurance Co. vs. Morse, 20 Wall., 445.
Ex parte Scholhnberger, 6 Otto, 369.

"A court of record is that where the acts and judicial proceedings are enrolled in parchment for a per-

petual memorial and testimony, which rolls are called the record of the court and are of such high and supereminent authority that their truth is not to be called in question. For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea or even proof be admitted to the contrary."

3 Blackstone Com., 24.

In determining the question of jurisdiction or not the record has been held to be conclusive in the following particulars in this Court:

(1). The citizenship of the parties to the record and not of persons not parties but beneficially interested in the litigation is the test of jurisdiction.

Bank vs. Osborn, 9 Wheat., 857.
Coal Co. vs. Blatchford, 11 Wall., 172.
Knapp vs. R. R. Co., 20 Wall., 117.

(2). "In the decision of who are the parties to the suit the Court will not look beyond the record."

Davis vs. Gray, 16 Wall., 220.

(3). In determing who are the plaintiffs and who the defendants in any suit, or, in the language of the Constitution, *who the controversy is between.*

Where the controversy is embodied in a suit the constitutional word BETWEEN *becomes versus and the different State citizens must be arrayed on opposite sides of that* VERSUS *in the record.*

"*Between*" is a technical word in the law, familiar to lawyers.

It is employed in the indenture to separate the parties of the first part and the parties of the second part.

"This indenture made this day of between the parties of the first part, and the parties of the second part." In legal phraseology the suit is between the plaintiffs and the defendants. The word is derived from "*be*" *and* "*twain*," and signi-

fies that there are two distinct things or parties. In this case the two parties are the plaintiffs and defendants in the suit, and the controversy is between them—divides them.

The United States Courts have always heretofore consistently adhered to this rule. For instance:

Where parties of similar interest with plaintiff, but of the same citizenship with some of the indispensable defendants, would, on that account, defeat the jurisdiction of the Court if made plaintiffs, the jurisdiction of the Court may be saved by making such parties defendants in the record.

Justice Story, in West vs. Randall, 2 Mason R., 181.
Bacon vs Robertson, 18 Howard, 480.
Hotel Co. vs. Wade, 7 Otto, 13.

"No reason is shown on the face of the bill why the other heirs having the same common interest (as complainant) are not parties to it. The answer gives their names and shows them within the jurisdiction of the Court, *and as defendants they might have been joined in this suit without touching the jurisdiction of the Court, for they are all residents in this State. As plaintiffs they could not be joined without ousting our jurisdiction, for then some of the plaintiffs would have been citizens of the same State as the defendants.*"

Justice Story, in West vs. Randall, 2 Mason, 181.

This practice and principle are sanctioned by the Supreme Court in:

Bacon vs. Robertson, 18 How., 480.
Hotel Co. vs. Wade, 7 Otto, 13.

This is tantamount to saying that the suit or controversy is between the plaintiffs and defendants in that suit, and the record must therefore show plaintiffs citizens of different States from defendants.

Under these decisions the test of jurisdiction has always been whether by the record of any suit the

plaintiffs were citizens of different States from the defendants. These decisions necessarily hold that those suits were not only "*suits by citizens of one or more States against citizens of another or other States*," within the language of the Acts of Congress, but that they were also "*controversies between citizens of different States*" within the language of the Constitution. In other words, the record in the arrangement of the parties as plaintiffs and defendants is the test, by these decisions, not only of *who the suit is between*, but also of *who the controversy is between*, because the Court in order to take jurisdiction must have a case which comes not only within the language of the statutes, but also within the language of the Constitution.

But it is intimated that Congress has established a new test by the Act of 1875; that whereas under the former acts the record, or rather "the pleadings only were looked at and the rights of the parties were determined solely according to the position they occupied as plaintiffs or defendants in the suit," under the Act of 1875 "the matter in dispute may be ascertained and the parties to the suit arranged on opposite sides of that dispute." "The pleadings may be put aside and the parties placed on different sides of the matter in dispute according to the facts." "If in such arrangement it appears that those on one side are all citizens of different States from those on the other the suit may be removed," &c.

Meyer vs. Construction Co., Supreme Ct., Oct. Term, 1879.

We humbly submit that unless the Court means that their former test was wrong, as determining what a controversy between citizens of different States is, within the language of the Constitution in legal parlance, they cannot consistently adopt any such principle as that indicated in the above quotations from the opinion in the Meyer case. The two tests are utterly inconsistent. If the Court had gone

into the business of "arranging the parties to the dispute according to the facts" in the three cases above referred to, they would have ousted themselves of jurisdiction. There cannot be two inconsistent tests in this matter, or one would oust the Court of the jurisdiction it would get by the application of the other.

We also submit that the old test is consistent with all the established rules of the Court.

(1) As to the indisputable sacredness of the record.

(2) As to the necessity of showing affirmatively at the outset in the record that the facts existed to give the Court jurisdiction of the suit.

(3) As to the necessity of the party making his case before he presents it to the Court.

For the Court to impose upon itself the duty of "arranging the parties about the matter of dispute," for the purpose of determining its jurisdiction, does seem a new departure in legal procedure.

Even if warranted in cases of removal, where the parties have not the peculiar practice of the United States Courts in view when they commence their suits, we contend that there is no good reason for extending the rule to cases originally brought in the United States Courts.

In the latter case the party should retain counsel who knows how to make a proper record; should arrange his own parties, and stand or fall by that arrangement.

The Meyer case did not involve the decision of these questions, and they were not, therefore, considered in the argument of that case. The case at bar is the first time they have really been presented for decision by the Court under the Act of 1875.

The following are the jurisdictional averments of the bill in this suit:

"Humbly complaining shows unto your Honors your orator, *George E. Ketchum, a citizen of the State of New York*, who brings this bill of complaint against the Pacific Railroad, a corporation

created under and by virtue of the laws of the State of Missouri, and against the Atlantic and Pacific Railroad Company, a corporation created and organized under and by virtue of an Act of Congress of the United States, approved July 27, 1866, and at the several times hereinafter mentioned engaged in operating and maintaining a railroad in the State of Missouri aforesaid; and against Jams Baker, Rufus J. Lackland, and Dwight Durkee, citizens of the State of Missouri; *and Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett and Luther C. Clark, citizens of the State of New York*" (record, page , fol.).

"Your orator has brought this action * * * and has made said Vail and Fish parties defendant herein" (record, page 10, folio 19).

The record therefore shows a suit in which the complainant is averred to be a citizen of New York, and six of the defendants are averred to be citizens of New York.

Evidently tested by the record, so far as the bill exhibits the record, the Court was without jurisdiction. This averment of the bill stood without change or amendment of any description, through the litigation, and judgment was entered with this standing as the only jurisdictional averment contained in the record, so far as the original parties were concerned.

This bill was filed November 11th, 1875. On February 16th, 1876, Cornelius K. Garrison and James Seligman, *averring themselves to be citizens of New York*, and Thomas W. Pierce, *averring himself to be a citizen of Massachusetts*, filed a petition adopting the bill of Ketchum, and praying to be *joined* with him as parties complainant; and on April 3d 1876, the Court ordered that "Seligman and Pierce have leave *to join* as complainants with George E. Ketchum" (see record, page 19, fol. 36).

WHEN THE RECORD SHOWS THAT THE COURT DID NOT HAVE JURISDICTION OF THE SUIT, THE PROCEED-

INGS IN THAT SUIT ARE ABSOLUTELY VOID AS CORAM NON JUDICE.

This is true of Courts, both those having general and those having limited jurisdiction.

Galpin vs. Page, 18 Wall., 350.
Thompson vs. Whitman, 18 Wall., 457.

When, therefore, Pierce and Garrison filed their petition to adopt this, and join Ketchum as complainant, the application was in a suit *coram non judice*, to adopt a bill in such a suit, and the order entered proposed to join them as parties in such a suit.

It was not an amendment (if that were possible in such a case), but an adoption and joining in a proceeding without legal existence. *Of course it was all affected by the same ruinous infirmity.* IT WAS VOID.

And even if it were not, the record then presents a suit in which the controversy is between three citizens of New York and one citizen of Massachusetts on the one side, *joined* as complainants, and six citizens of New York and citizens of Missouri on the other side as defendants.

It must be remembered that the complainants' interest in the mortgage sought to be foreclosed is joint, and not several (*Railroad Co. vs. Orr*, 18 Wall. 471), and by the order Pierce is made a joint complainant with Ketchum.

And, although the Court might have permitted Pierce alone to bring the suit as the representative bondholder, the suit was not so brought.

"The complainants chose to stand upon their case as they presented it."

Bank vs. Carrollton, 11 Wall, 631.

Applying these principles to test the jurisdiction of the Circuit Court in this cause, we find a bill in Chancery filed by Ketchum, describing himself as a citizen of New York, making defendants six persons alleged to be citizens of New York and several

others alleged to be citizens of Missouri. Obviously such pleading presents a controversy over which the Circuit Court could not constitutionally exercise any jurisdiction whatever, unless the six defendants, having the same citizenship as the complainant, were merely nominal parties, in which event the bill might be dismissed as to them and retained for decree against the remaining defendants. "The question always is, and should be, when objection is taken to the jurisdiction of the Court by reason of the citizenship of some of the parties, whether to a decree authorized by the case presented, they are indispensable parties."

Horn vs. Lockhart, 17 Wallace, 579.

The relation of these six citizens of New York to the subject matter of controversy and the relief prayed, will demonstrate whether, under the rulings of this Court, they were nominal or indispensable parties, to authorize any decree whatever. Vail and Fish were the trustees in the very mortgage sought to be foreclosed. Not only the amount due, but the validity of that mortgage and the right to foreclose under it, were to be litigated. The legal estate was vested in them. "They are the parties to the mortgage contract, negotiating its terms and stipulations, and to them the usual rights and powers of mortgagors are reserved, and to them the usual obligations of mortgagors are made."

Coal Co. vs. Blatchford, 11 Wallace, 170.

In *Connolly vs. Taylor* (2 Peters, 556), bill was filed in District of Kentucky, by aliens and by citizens of Pennsylvania against citizens of Kentucky and one citizen of Ohio.

The Court say: "Had the cause come on for hearing in this state of the parties, a decree could not have been made in it, for want of jurisdiction."

"The substantial parties are aliens, and the Court had original jurisdiction between them and all the defendants. But they prevented the exercise of this

jurisdiction by uniting with themselves a person between whom and one of the defendants the Court cannot take jurisdiction. Had the cause come on for hearing in this state of the parties, a decree could not have been made for want of jurisdiction."

In *Vattier vs. Hinde* (7 Peters, 252), the same practice is sanctioned.

Still more recently it has been decided that the trustees in such an instrument are not nominal, but are the real parties in interest to enforce a claim accruing to them in the execution of their trust, and are charged with the responsibility of conducting the litigation.

Knapp vs. Railroad Co., 20 Wallace, 123.
Gardner vs. Brown, 21 Wallace, 36.

This proceeding did not simply embrace a formal foreclosure of bonds outstanding at the time when the bill was filed; it had a broader scope. The bill alleged, and the decree found, that divers unissued third mortgage bonds were even then in the hands of Vail and Fish, who were ordered to exchange them at any time before sale for income and improvement bonds, and these very bonds, thus emitted after decree and before sale, were declared to be a legal tender on the bid. In this respect the case was like that of *Knapp vs. Railroad Co., supra*, in some of its features, where the Supreme Court say that the trustees could not be relieved by any act of the State Legislature of their relations to the controversy. The Court thus assumed the general guardianship of an executory trust, acting directly *in personam* upon citizens of New York at the suit of another citizen of the same State.

The only standing which Ketchum had in a court of equity to foreclose the mortgage was to enforce the trust on the alleged malfeasance of the trustees. "So long as the trustees do not refuse to discharge the trust reposed in them, other parties are not authorized to institute or prosecute any proceedings

for the enforcement of the mortgage, or to exercise any control over them."

Coal Co. vs. Blatchford, 11 Wallace, 170.

"The bondholders can ask the aid of a court of equity only on the ground of unfaithfulness, neglect or inability on the part of the trustees. The only standing the original complainants had in court arose from the allegation in their bill that the trustees, in their mortgage, were derelict."

Per Waite, *C. J.*, in Richards vs. Chesapeake & Ohio Railroad Co., 1 Hughes, 28.

In such a suit the trustees represent the other bondholders. One bondholder cannot bring suit, even though professing to act in behalf of all who may come in and contribute to foreclose a mortgage given to secure several bondholders whose several interests are described, unless the other bondholders join with him.

Railroad Co. vs. Orr, 18 Wallace, 471.

The *cestuix que trust*, that is the bondholders, could not maintain this action, except in case the trustees refuse to perform their duty, and then the trustees must be made parties defendant.

Western Railroad Co. vs. Nolan, 48 N. Y., 513.

Ribon vs. Railroad Co., 16 Wallace, 450.

Ketchum's bill, in this case, made the allegation of unfaithfulness. Whatever was necessary to be alleged must necessarily be proven at the hearing to justify relief. In this view the suit was primarily and directly against the trustees, charging a breach of trust, and that must be alleged and proven as a condition precedent to any remaining belief.

Walker vs. Sigmonds, 3 Swanston, 75.

Perry vs. Knapp, 4 Beav., 179.

Dodge vs. Wolsey, 18 Howard, 331.

Memphis vs. Dean, 8 Wallace, 73.

There was, therefore, at the very threshold of the suit for the foreclosure of this mortgage, a controversy between citizens of the State of New York, which must be decided in favor of the complainant before the Court could recognize any further right of action in the complainant. Summoned to answer in the charge of infidelity to their trust, the trustees could, of course, plead to the jurisdiction, tender an issue defending their primary right of control of the trust vested in them, advance evidence and appeal from a decree convicting them of a breach of trust or displacing them. This would obviously constitute a material and definite controversy, incapable of being tried in a Federal Court, between bondholders and trustees of a similar citizenship. This was the precise issue tendered by the bill in this cause. The trustees filed no cross-bill; this decree of foreclosure was based on the original bill of the bondholder; this could only be justified on the theory that the charge of dereliction had been proven or admitted. Over that controversy, the settlement of which was an indispensable prerequisite to any relief, the Circuit Court had no jurisdiction whatever, because it was exclusively between citizens of the same State. The fact that another controversy might exist in the cause between the parties of differing citizenship would not save the jurisdiction. The suit would not present a clean controversy between citizens of different States.

Sewing Machine Co.'s cases, 18 Wallace, 575.
Vanderveer vs. Bryant, 21 Wallace, 41.
Kendig vs. Dean, 7 Otto, 423.

The other citizens of New York, defendants, were trustees under prior mortgages. The scope of the bill was to sell, subject to such earlier incumbrances. This necessitated an issue as to their extent, validity, date and amount. The decree adjudged upon such matters and ordered the sale, subject to these ascertained incumbrances. They were never dismissed from the record, and are indispensable par-

ties to the validity or efficiency of the decree as enrolled, and the same objections exist against this exercise of jurisdictien in the case of the other citizens of New York, defendants, which apply to Vail and Fish.

Eighth.

The consistent stand taken by the Supreme Court during its ninety years of existence upon the principle that it will only decide clean controversies between citizens of different States disentangled from other controversies, is in entire harmony with the strict rules it early established, and has rigidly adhered to, to enforce this principle, and also with its rulings upon all kindred questions.

(1) "There are absolutely no presumptions in favor of the jurisdiction of the Courts of the United States."

Ex parte Smith, 4 Otto, 455.
Robertson vs. Case, 7 Otto, 646.

(2) The citizenship of the parties must be averred upon the record, so that the facts necessary to give the Court jurisdiction may affirmatively appear at the outset, or in default thereof the Court will not exercise jurisdiction.

Bingham vs. Cabot, 3 Dalllas, 382.
Turner vs. Emille, 4 Dallas, 7.
Gold Washing and Water Co. vs. Keyes, 6 Otto, 199.
Godfrey vs. Terry, 7 Otto, 171.

(*a*) The averment must be of citizenship. It is not enough to use an equivalent phrase.

Abercrombie vs. Dupuys, 1 Cranch, 346.
Robertson vs. Case, 7 Otto, 646.

(*b*) The rule is strictly enforced as to time.

Insurance Co. vs. Pechno, 5 Otto, 186.

(c) It must also be an an individual citizenship.

Amory vs. Amory, 5 Otto, 186.

(3) In actual practice the rules for applying these tests of the jurisdiction are well settled. If the record is silent as to the jurisdictional character of citizenship, the judicial proceedings are subject to be evaded on error or appeal.

Bingham vs. Cabot, 3 Dallas, 382.
Gold Washing and Water Co. vs. Keyes, 6 Otto, 199.

If the citizenship is so laid that the jurisdiction would *prima facie* attach, but in point of fact is falsely averred, the apparent jurisdiction may be ousted by pleading the truth in abatement.

Livingstone vs. Story, 11 Peters, 353.

In all cases where the citizenship is so averred as to exhibit on the very face of the record a controversy wholly or partly between citizens of the same State the judicial power does not, and cannot, under the Constitution, extend to such a controversy. The Circuit Court has, consequently, no jurisdiction, and its decrees and acts thereunder are absolutely void.

Hickey vs. Stewart, 3 Howard, 750.
Coal Co. vs. Blatchford, 11 Wallace, 172.
Mail Co. vs. Flanders, 12 Wallace, 130.

This rule is so rigid that the result is not altered, though the subject matter of the controversy relates exclusively to Federal questions, if Congress has left the jurisdiction to depend on differing citizenship, and not upon the subject matter. Controversies between citizens of the same State touching abandoned property acts are not cognizable.

Jackson vs. Ashton, 8 Peters, 148.
Nail Co. vs. Flanders, 12 Wallace, 130.

Nor under the customs act.

Insurance Co. vs. Ritchie, 4 Wallace, 542.
Hornthall vs. Collector, 9 Wallace, 564.

This fact of different citizenship is the jurisdictional fact without which the Court cannot take jurisdiction of the suit, and which cannot be legally waived by the Court, and the rules therefore applicable to it, in connection with jurisdiction, are the same rules that apply to any other subject matter in contra-distinction from the rules usually applied by the Courts upon the question of their jurisdiction over persons. Positive consent cannot, therefore, either originally authorize the exercise of jurisdiction in such case, or rescue from annulment the decrees entered in violation of the constitutional prohibition.

Bingham vs. Luddington, 12 Blatchford, 241.
The Nonesuch, 9 Wallace, 504.
Washington County vs. Durant, 7 Wallace, 694.
The Alicia, 7 Wallace, 571.
Scott vs. Sanford, 19 Howard, 393.
The Lucy, 8 Wallace, 307.

The only qualification that exists to these rules is where a merely nominal party, having similar citizenship to the complainants, or some of them, is made a co-defendant, the jurisdiction may be saved by striking out, at any time before hearing, the name of such nominal party, and proceeding to decree against the real parties in interest who are liable to suit.

Connolly vs. Taylor, 2 Peters, 564.
Vattier vs. Hinde, 7 Peters, 261.
Horn vs. Lockhart, 17 Wall., 570.

(3) The adherence of the Court to this principle is also in entire harmony with its long series of decisions under tbe twenty-fifth section of the Judiciary Act, where the Supreme Court has

steadfastly refused to take jurisdiction by appeal of any case or question that did not strictly conform with the affirmative terms of that section, and is also in harmony with the recent construction given by this Court to the Act of 1867, which omitted the restrictive clause contained in the 25th section of the Judiciary Act, and yet the Court refused under this act to decide anything but the Federal question contained in such cases. In interpreting this latter Act, in *Murdock vs. The City of Memphis* (20 Wallace, 590), the Court say: "Congress having defined and regulated jurisdiction in certain classes of cases, the affirmative expression of the will of that body is to be taken as excepting all other cases to which the judicial power of the United States extends than those enumerated." Certainly it would seem that the same rule of interpretation was applicable to the Constitution.

Ninth.

The United States Courts, in the class of cases under consideration, are foreign tribunals. They form no part of the State judiciary; yet nine-tenths of the cases they are called upon to consider are cases which involve only State questions. The subject matter is purely of State judicial cognizance.

"The duties of the Court to exercise jurisdiction when it is conferred and not to usurp it when it is not conferred, are of equal obligation."

Chief Justice Marshall, in *Bank vs. Devaux* (5 Cranch, 87):

"It is our duty not to transcend the limits of the jurisdiction conferred upon the Court."

Fulton vs. McAfee, 16 Peters, 152.

In other words, the Supreme Court has always taken the ground that the right to decide a suit

must be clear and indisputable, or they would not allow jurisdiction.

The wisdom and prudence which gave original shape to our governmental institutions avoided every possible temptation to collision between sovereign states and a sovereign nation. Our fathers recognized the fact that different governments should have distinct spheres of action. Confederacies of States, in the world's history, have always been short-lived, through neglect of this principle. The State government and the State judiciary must of necessity be charged with the control and administration of State and local affairs. A foreign tribunal, representing a distinct sovereign, should not meddle with such administration or control, if there is a shadow of a doubt about the right to do so.

In the first place, it introduces confusion, and inevitably leads to contrariety of decision. Uniformity and certainty are the prime essentials of law.

In the second place, it is a source of irritation, and leads to collisions between the respective governments, and although to day the national government is strong and the States comparatively weak, the time has been when their positions in this respect were reversed—it may come again. At any rate we should avoid all ways that lead to conflict. For whether the nation or the State is victorious in such a struggle, the body politic is wounded.

It must be remembered that the administration of justice, accorded under the Constitution to the United States Courts, between citizens of different States, does not involve the administration of any national laws. The United States Courts are called upon to administer the laws of the States where the courts are situated or the transaction occurred. When one sovereign administers the laws of another sovereign, it has always has been as a matter of courtesy or comity. It does it only in the interest of justice, usually because the parties are without any other tribunal. But the United States Courts have not this excuse. The State Courts are the

proper tribunals for local litigation; and for the United States Courts to step into every suit in which a citizen of another State has an interest, and drag all the parties away from the tribunal which naturally administers the laws under which the transaction occurred and the suit arose, would be both an unreasonable and a very dangerous practice.

The State Courts bring justice to every man's door. The United States Courts are located at only one or two points in each State, and the hardship of carrying on a distant litigation would in many instances amount to a denial of justice.

Tenth.

As in ordinary cases there is a presumption against the jurisdiction of the United States Courts, there ought to be a double presumption against their jurisdiction in this class of cases.

In State affairs, in cases arising under the local laws, the United States Courts are foreign tribunals. The State Courts are the natural tribunals. The United States Courts are amenable to one sovereign, and yet are administering the laws of an entirely different sovereign.

They are appointed by one sovereign to administer the laws of another in that other's territory. In this respect, in this class of cases (controversies between citizens of different States), the United States Courts are like Consular Courts.

The presumption is always against the jurisdiction of such Courts, and they can only decide cases that come within the strictest letter of the powers conferred upon them by treaty. So the United States Courts, in this class of cases, should be confined in their jurisdiction to the strict letter of the Constitution.

Eleventh.

THE SALE TO JAMES BAKER, THE SOLICITOR AND A DIRECTOR OF THE PACIFIC RAILROAD WAS, UNDER THE CIRCUMSTANCES, A GROSS FRAUD. HE WAS INCOMPETENT TO PURCHASE, AND THE DECREE CONFIRMING THE SALE TO HIM WAS ERRONEOUS AND VOID BOTH AS AFFECTED BY THE SAME INFIRMITIES AS THE DECREE OF FORECLOSURE AND SALE, AND BECAUSE IT VIOLATED THE UNIVERSAL PRINCIPLE OF EQUITY "THAT NO MAN WHO UNDERTAKES TO ACT FOR ANOTHER SHALL IN THAT MATTER ACT FOR HIMSELF."

Courts are especially jealous to see that their own officers do not violate this principle.

In *York Building Co. vs. McKenzie* (8th Parl. Cas., by Tone, in appendix, page 24; also 3d Paton, 378) plaintiffs and appellants were an insolvent company whose estate was sold, under a decree of the Court, at judicial sale. Defendant was what in England is known as the "common agent" (who is appointed by the Court to procure the information upon which the Court fixes what is termed the "upset price" at judicial sale).

Defendant reported to the Court, and the Court, upon his report, fixed the "upset price" at what on all hands was acknowledged to be a perfectly fair price. At the sale defendant bought the property at the upset price. The sale was confirmed by the Court. Defendant went into possession, made extensive improvements at large expense and occupied for eleven years before objection was raised. Plaintiff then sued to have the sale set aside on the ground that the defendant was disabled from buying the property by the fact that he had once undertaken to act for others in relation to it. *No fraud was claimed.* After two long arguments the House of Lords set the sale aside.

In the suit at bar, Baker was wholly incapaci-

tated from making such a purchase, by reason of his fiduciary relation.

Michaud vs. Girod, 4 How., 503.
Cov. & Lex. R. R. vs. Bowler, 9 Bush. (Ky.), 468.
Ex parte James, 8 Ves., 352.
Godin vs. Canal Co., 18 Ohio S., 182.
Hoyle vs. Plat. & M. R., 54 N. Y., 314.

The sole ingredient of such a purchase by the solicitor, in the interest of public justice, is declared to carry fraud on its face, no matter with what judicial authority or ministerial exactness the act may be clothed.

It is a rule founded upon sound policy and clear principles of equity, and has received unequivocal indorsement by this Court.

Ordinarily the purchase price is a charge on the estate upon resale, but if the purchase was made in bad faith, and with the intent to speculate at the expense of the rights and interest of the client, using the knowledge derived from that relation for this purpose, the remedy might not be too strong even to set aside the sale and relieve the property from the encumbrance without the terms mentioned.

Stockton vs. Ford, 11 How., 247.

And again this language is used in condemnation of a purchase of the estate by a solicitor. "When all these acts on the part of the appellant are adverted to, they impel irresistibly to the conclusion, that the gross inadequacy of consideration in the sale and purchase of these lands, was the premeditated result which the proceedings by the appellant were put in practice to assume.

"They betray that *malus dolus* in which the design of the appellant was conceived, which appears to have presided over and regulated the progress of the design from its birth to its consummation, to which design the appellant has tenaciously clung in the

seeming expectation that it was beyond the corrective powers of law or justice."

"Upon the whole case, we are constrained to view the entire transaction impeached by the appellee as one that cannot be sustained without the subversion of the principles and rules, either of legal or moral justice. We accordingly approve the decision of the Circuit Court in so regarding it, and order that decree to be approved."

Byers vs. Swiget, 19 Howard, 312.

If an attorney-at-law purchases an opposing or outstanding title to land, the knowledge of which he has obtained during the continuance of professional relations to his client, such purchase will enure to the benefit of the client while he holds the land, or to that of his order after he has conveyed his interest. On paying or tendering the amount paid by the attorney, with interest, the client or his vendee may recover the premises won from the vendee of the attorney, with interest.

Henry vs. Rossnan, 25 Pa. St., 354.

A sale of property in the course of litigation to an attorney against the interest of the client in the suit in which he is engaged is void.

Harper vs. Perry, 28 Iowa, 57.
Wright vs. Walker, 30 Ark., 44.

Title to all securities taken by a solicitor in transactions for his client is presumptively void.

Brown vs. Bulkley, 1 McCarter, 451.

Remembering that this suit was inspired by Baker —brought under his supervision—and that he, as solicitor, entered the corporate appearance and consented to the oppressive, fraudulent and false decree under which he now, as purchaser, claims title to all the corporate property to which he owed his best services as adviser and defender the case furnishes the very worst of that rapidly growing list of at-

tempts by trustees to acquire valuable railway property through the medium of their own constructive frauds.

James vs. R. R. Co., 6 Wall., 752.
R. R. Co. vs. Howard, 7 Wall., 392
Dewey vs. Cross, 7 Wall., 302.
Wash. R. R. vs. Bradley, 10 Wall., 303.
Harward vs. R. R. Co., 14 Wall., 78.
Cov. & Lex. R. R. Co. vs. Bowler, 9 Bush., 468.
Campbell vs. R. R. Co., 1 Woods, 368.
Jackson vs. Ludeling, 21 Wall., 592.

The record on the appeal presents all the facts that would have to be proven in an original suit, to enable the Court to set aside this order confirming the sale.

The fiduciary relation appears.

The purchase by him presumptively for his own personal interest, as the deed and order both refer to him in an individual and not in a representative capacity.

There is an absolute presumption of constructive fraud on this condition of the facts.

Michaud vs. Girod, 4 How., 303.
Davoue vs. Fanning, 2 Johns, Ch. (N. Y.), 252.
Brown vs. Bulkley, 1 McCarter, 451.

Twelfth.

The relations of Baker, the solicitor, to the Pacific Railroad, as his client, were severed the moment he assumed the hostile attitude of a purchaser of its property. He, *ipso facto*, discharged himself.

From that moment the company was without any solicitor to represent it in court, and it was unrepresented, and the confirmation of the sale was made without the Pacific Railroad's being represented in Court. Its solicitor had turned traitor and gone over to the enemy; had abandoned his attorneyship and become a purchaser. The appellant was then in the position of the plaintiff in the case of Wind-

sor vs. McVeigh (3 Otto, 274), and entitled to the same protection of the Court accorded in that suit.

Thirteenth.

The record in this suit fairly reeks with perfidy, fraud and robbery.

The bonds and mortgage were conceived and prepared to steal the property.

They were dated in July, 1875, and the first coupon was made to mature on November 1st of that year. The bill to foreclose was drawn and printed in October, and sworn to November 3d, 1875. It was phrased most vaguely and indefinitely, because they knew the real facts did not warrant a foreclosure, and their only hope lay in the fact that they controlled the entire organization of the mortgagor company, including the attorney of the company, and they trusted, without any very definite allegations in the bill, to secure a foreclosure through his acquiescence or assistance. Baker, the attorney, immediately appeared, and admitted the allegations of the bill.

They quieted the clamors of stockholders and lulled them into inaction by promises that their interests should all be protected by a reorganization. They induced the trustees to enter appearances and file answers submitting their rights to the Court; and then, by the consent of the solicitors of record, they entered a decree then and there annihilating the mortgagor company, and directing the sale of the property, and making their unmatured bonds a legal tender for the property.

The property is sold. Baker, the solicitor of the company, bought it. The stockholders, seeing that his treachery left the company unrepresented, asked to be allowed to defend, and that the sale be not confirmed, which was refused. Baker sold the property to the bondholders. The stockholders, robbed of $7,000,000, bound and gagged, had to

wait six months before they could even take an appeal or use the name of their own company.

Such is the outline this record displays. To fill those outlines would disclose many a ghastly tale of suffering and distress.

In *Holker vs. Parker* (7 Cranch), 436, this Court adjudged a consent decree void upon a much weaker showing than is made in the record in this suit.

In that case plaintiff had had several adjournments of the trial before Referees—knew that the cause was set down peremptorily for trial, yet made no preparation for the trial. He also knew that this compromise or consent to decree in his favor was proposed, giving him $7,000 instead of $100,000, which he claimed. He said nothing. On the day of trial his attorneys simply did not object to the entry of a decree for the compromise amount, because they deemed that better than a dismissal. The Referees gave him judgment for that amount, and the Supreme Court declared the judgment void.

There was not a fact in the case that indicated fraud of any kind. It was simply decided as a question of power in the attorney.

The case at bar has all the elements which were decisive of the Holker case, and besides is black with fraud and treachery.

Fourteenth.

These decrees must be reversed, and suit either dismissed for want of jurisdiction or all proceedings after printing of issue annulled, or at least a resale ordered

TREMAIN & TYLER,
167 Broadway.

MASON W. TYLER,
N. A. COWDREY,
M. H. CARPENTER,
Of Counsel for Appellants.

IN THE

Supreme Court of the United States.

No. 242.

THE PACIFIC RAILROAD (OF MISSOURI)

vs.

GEORGE E. KETCHUM & OTHERS.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

SUPPLEMENTAL BRIEF

OF

JAMES O. BROADHEAD,

Solicitor for Geo. E. Ketchum, James Baker, and the Missouiri Pacific Railway Company, Respondents.

WASHINGTON:
JOSEPH L. PEARSON, PRINTER,
Corner 9th and D streets.
1880.

IN THE

Supreme Court of the United States.

THE PACIFIC RAILROAD, Appellant,

vs.

GEORGE E. KETCHUM, CORNELIUS K. GARRISON, AND OTHERS.

Case No. 242.

STATEMENT OF THE CASE.

This is a bill in equity to foreclose a mortgage, brought by the complainant, George E. Ketchum, who claims to be the owner of certain bonds, made by the Pacific railroad, a corporation incorporated by the laws of the State of Missouri, and called the third mortgage bonds of said company, and which bonds were secured by mortgage executed by the company to Henry F. Vail and James D. Fish, as trustees, and made to secure the payment of an issue of four thousand bonds of one thousand dollars each, dated July 10, 1875, payable twenty years after date to bearer, with interest at 7 per cent. from May 1st, 1875, the payment of which bonds was guarantied by the Atlantic and Pacific Railroad Company.

The bill alleges that the Pacific railroad executed a mortgage dated July 15th, 1868, to Uriel A. Murdock, James Punnett, and Luther C. Clark as trustees, by which the company conveyed and mortgaged to the said trustees all the road and other property of the said company, in trust to secure the payment of a series of 7,000 bonds, mentioned in said mortgage, severally dated the first day of

August, 1868, for the sum of $1,000 each, payable twenty years after date, with interest at the rate of six per cent., payable semi-annually; that the whole amount of seven millions of dollars of bonds, secured by said mortgage, were executed, issued, and negotiated by said company and are now outstanding; that the interest has been regularly paid on said bonds, and that no interest is due thereon, and that said mortgage is a first lien upon the property of the company.

2. That the company made and delivered to Edwin D. Morgan and Joseph Seligman a mortgage or deed of trust, dated July 1st, 1871, by which the same property mentioned in the preceding mortgage, was conveyed to the said Morgan and Seligman, subject to the lien of the last-mentioned mortgage, in trust to secure the payment of an issue of three thousand bonds, dated severally July 1st, 1871, for the sum of one thousand dollars each, payable twenty years after date, with interest at the rate of seven per cent. per annum, payable semi-annually. That the whole amount of said last-named bonds was executed, issued, and negotiated by the company, and that under a clause in said mortgage providing for a sinking fund, one hundred and ninety-six thousand of the bonds secured thereby have been redeemed and cancelled, and that the residue, amounting to $2,804,000, are now outstanding and unpaid; that the interest has been duly and regularly paid upon all the bonds outstanding, and that said mortgage is a second lien upon the property.

3. That the Pacific railroad made and delivered to defendants, Rufus J. Lackland and Dwight Durkee, a mortgage or deed of trust, dated April 19, 1872, by which the Pacific railroad mortgaged to Lackland and Durkee certain real estate in the city of St. Louis, in said mortgage described, in trust to secure the payment of an issue of bonds amounting, in the aggregate, to $800,000, each dated May 1st, 1872, payable twenty years after date, with interest at

the rate of eight per cent. per annum, payable semi-annually, of which said bonds 600 were for the sum of $1,000 each, and 400 for the sum of $500 each. That the whole amount of said bonds were issued and negotiated, and are now outstanding.

4. That subsequent to the execution of the last-named bonds, the company constructed a branch road intersecting its main line at Kirkwood, and extending to the Mississippi River at Carondelet; and that thereupon the Pacific railroad made and delivered to Jesse Seligman and James Baker a mortgage or deed of trust, dated October 1st, 1873, conveying to said Seligman and Baker the said branch road and appurtenances in trust to secure the payment of an issue of five hundred bonds, each for the sum of $1,000, dated October 1st, 1873, payable twenty years after date to bearer, with interest at the rate of six per cent., payable semi-annually on the first days of April and October. That all of said last-named bonds were executed, issued, and negotiated, and are now outstanding and unpaid; that the interest thereon has been regularly paid.

5. That the Pacific railroad made and delivered to Henry F. Vail and James D. Fish a deed of trust or mortgage, dated July 10, 1875, by which the Pacific railroad mortgaged all the property, real and personal, rights, interests, and franchises of said railroad company, included in and covered by each of the four mortgages hereinbefore mentioned, in trust to secure the payment of an issue of four thousand bonds, termed "third mortgage bonds," of one thousand dollars each, dated July 10, 1875, payable twenty years after date to bearer, with interest at seven per cent. per annum, from May 1st, 1875, payable semi-annually on the first of November and May of each year, and that the payment of each of said bonds was guarantied by the Atlantic and Pacific Railroad Company.

That said mortgage contained a clause to the effect, that if the said Pacific railroad should fail to pay the interest

on any of said bonds thereby secured, for six months after the same became due and payable, and demand made therefor, or if the principal sum of any of said bonds, when payable, should not be paid for six months after demand, said trustees were authorized and required, on the written request of holders of bonds to the amount of $500,000, the principal or interest of which should then be in arrear or unpaid, to sell the said railroad and branch railroad, and all the property by said mortgage conveyed, at public auction, in the city of St. Louis, giving notice thereof as specified in said mortgage, and to convey the property to the purchaser.

That said mortgage of July 10, 1875, recites the fact, and the fact was, that the Pacific railroad had issued its bonds, amounting in the aggregate to $1,500,000, and designated as income bonds, each of which bonds was dated September 2d, 1872, payable on the 1st of September, 1892, with interest at seven per cent. per annum, payable on the first of March and September of each year; and that said company had also made a further issue of bonds, amounting in the aggregate to the principal sum of $2,000,000, and designated as improvement bonds, consisting of two thousand bonds of $1,000 each, and dated December 15th, 1874, payable on the 1st of November, 1889, with interest at seven per cent per annum, payable on the first of May and November of each year.

That the interest and principal of said income and improvement bonds were chargeable against and payable out of the earnings of the said railroad, prior to any dividend on its capital stock, but were not secured by any mortgage or lien upon any of the property before mentioned.

That said last-named mortgage recited and declared that a portion of said third mortgage bonds should be used in retiring and cancelling the issue of the income bonds and the improvement bonds, so far as the same could be done, and that the residue of said bonds should be i-sued by said company for the purpose of obtaining additional sums of money for the permanent improvement of its road.

That the entire amount of the third mortgage bonds secured by said mortgage was issued by the company, and a sufficient number of the bonds to retire the income and improvement bonds was placed in the hands of the trustees in the third mortgage, Vail and Fish, for the purpose of being exchanged for such income and improvement bonds; that about $2,000,000 were exchanged for income and improvement bonds; that upwards of $300,000 of said bonds have been negotiated by the company; that all the bonds are now outstanding and unpaid, and that none of the interest which fell due on the 1st of November, 1875; has been paid according to the terms of the mortgage; that complainant was the holder of certain of said bonds; that the coupons were presented for payment at the place where by the terms thereof they were payable, and payment demanded and refused.

It was further averred that the Atlantic and Pacific Railroad Company was engaged in the operation of a continuous line of railway from Franklin, in the State of Missouri, distant about 37 miles from St. Louis, to the western boundary of the state, and thence to Vinita in the Indian Territory; that said last-named corporation has no mode of reaching St. Louis except over the road of the "Pacific railroad," and that it has no depots or other facilities of transacting business in the city of St. Louis. That on the 29th of June, 1872, the Pacific railroad leased to the Atlantic and Pacific railroad the entire line of railroad then operated by it, including certain leased lines then under the management and control of the Pacific railroad; that the Atlantic and Pacific Railroad Company took possession of the lines of railway so leased to it, and managed and operated the same; that subsequent to said lease an additional line of road, extending from Kirkwood, a point on the Pacific railroad, to Carondelet, on the Mississippi River, a distance of 15½ miles, was built, and has been managed and operated by the Atlantic and Pacific Railroad Company; that additions and improvements have been made upon the

main line and branches from time to time since the lease, and large amounts of money expended; that large purchases have been made of locomotives, cars, and rolling-stock of different kinds used in operating the roads; that the Atlantic and Pacific and the Pacific road and the branches have been operated as one road, and that it is necessary that they should be so operated for the interests of all parties concerned.

6. That by the terms of the lease the Atlantic and Pacific Co. agreed to pay the interest on all the mortgages executed by the Pacific railroad—and to pay the leases of the leased line—and also certain dividends upon the stock of the company; that the dividends payable under the terms of the lease on the 20th of October, 1875, were not paid, and the Atlantic and Pacific Co. were in default therein; that obligations in various forms for the payment of money were from time to time issued by the Atlantic and Pacific R. R. Co. in the name of the Pacific railroad for the payment of which the Pacific railroad was liable; and that the Atlantic and Pacific Railroad Company has made default upon the payment of the interest on its bonds secured by mortgages, executed upon the property belonging to it before the making of the lease; and has become embarrassed by floating debts to a very large amount, and has been unable to pay the dividends on stock above mentioned, and the interest due on the first of November upon the third mortgage bonds, and that the creditors of the Pacific road and the Atlantic and Pacific road have threatened to sue said corporations, and each of them, and have sued said last-named corporation.

That there is a large sum of money due for taxes remaining unpaid, for which each of the companies is responsible.

That the Pacific railroad is unable to pay its valid obligations as they become due; that its commercial paper has been protested; and that it is liable to actions, suits, and proceedings on account thereof; and that there is great danger that the property covered by the third mortgage

may be attached or levied upon, under execution or other legal process.

The bill further alleges that the interest upon the first and second mortgages has been regularly paid, and that the property covered by them is ample security for the payment of the bonds secured by these two mortgages.

That the net earnings of the railroad are sufficient to provide for and pay the interest becoming due under all the mortgages which were prior liens to the third mortgage, but that the mortgaged property is insufficient to pay the debts becoming due under the last-named mortgage, and that the rights and interests of all the parties concerned in the third mortgage and the rights and interests of the creditors of the Pacific railroad not secured by mortgage require that a receiver should be appointed.

The bill further alleges that the Atlantic and Pacific Railroad Company was in default in the payment of interest upon one of its mortgages made to secure the payment of an issue of six millions of dollars of bonds, and that an action has been instituted on behalf of the holders of such bonds to foreclose the mortgage and for the appointment of a receiver for the property and effects of that company, including the property leased to it by the Pacific railroad.

The bill further alleges that an application was made by the complainant on behalf of himself and other holders of bonds secured by the third mortgage, to Henry F. Vail and James D. Fish, trustees in said mortgage, to take proceedings to foreclose the mortgage and protect the interests of the bondholders, but that no such proceedings have been taken, and, as the complainant is informed, some doubt is expressed whether, under such mortgage, they have the right to institute proceedings by reason of the non-payment of the interest due on the first of November, 1875, and for such reason preferred not to take such proceedings.

That the complainant being apprehensive that his interests and the interests of other holders of like bonds may be seriously affected by the delay in the proceedings to foreclose

the mortgage, has brought this action on his own behalf and in behalf of all others similarly situated.

The bill then proceeds to pray for a decree of foreclosure of the mortgage and a sale of the property subject to the lien of the two first mortgages, and that subject to the payment of such prior liens, the net proceeds of the sale of the mortgaged premises under the mortgage of July 10th, 1875, may be applied to the payment of all bonds secured by the mortgage, and the interest thereon, without discrimination or preference and ratably; that a receiver be appointed to take charge of all the property of the Pacific railroad, including the lines of railroads and other property transferred to and held by the Atlantic and Pacific Railroad Company under the lease from the Pacific railroad, and all the rolling-stock appurtenant to said lines of railway, and that the defendants be enjoined from interfering with, transferring, selling, or disposing of any of the property, and a prayer for general relief.

This bill was filed by George E. Ketchum, a citizen of the State of New York, against the Pacific railroad, a corporation created by the laws of Missouri, the Atlantic and Pacific Railroad Company, a corporation created and organized under an act of Congress, now operating its road within the State of Missouri, and against James Baker and Rufus J. Lackland, citizens of the State of Missouri, Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett, and Luther C. Clark, citizens of the State of New York. Of these so-called defendants, who are citizens of the State of New York, Uriel A. Murdoch, James Punnett, and Luther C. Clark are trustees under the first mortgage, dated July 15, 1868; Edwin D. Morgan and Joseph Seligman are trustees under the second mortgage, dated July 1st, 1871; Jesse Seligman, one of the trustees under the mortgage on the Carondelet branch road, and Henry F. Vail and James D. Fish are trustees under the third mortgage.

On the 7th of February, 1876, Thomas P. Akers, claiming to be a stockholder of the Pacific railroad, filed a cross-

bill asking to be heard in the case as a stockholder and alleging, among other things, the invalidity of the third mortgage bonds, and charging that they were fraudulently issued.

On the same day the Pacific railroad filed its answer to the bill of complaint in this case, admitting substantially the facts set forth in the bill, and averring that the third mortgage bonds and the mortgage to secure the same were made in good faith, by the authority of the board of directors of the company and of the stockholders, and constituted a legal and binding obligation on the part of the company; but averring that it was informed that a portion of the stockholders claimed that the said bonds and mortgage were fraudulent and void; and they ask that the court will permit any of the stockholders to become parties defendant to this suit, on a proper showing and making such defence in the premises as they may see proper.

On the 16th of February, 1876, C. K. Garrison and others presented a petition to the court asking that they might be made parties complainant to the bill of complaint in this cause, averring that they are the holders of a large number of the third mortgage bonds, to the amount of eighteen hundred thousand dollars of said bonds, and they were permitted to become parties.

On the 25th of March, 1876, Peter Marie, Frank A. Otis, Robert L. Cutting, jr., James D. Cutting, citizens of the State of New York; George R. Fearing, a citizen of the State of Rhode Island, stockholders of the Pacific railroad, presented their petition to the court, averring that Thomas P. Akers, a stockholder of the company, had filed his cross-bill in this cause, averring that he filed the same not only for his own benefit as a stockholder, but for the benefit of all other holders of shares of the capital stock of the company who may come in and contribute to the cost and expense of prosecuting said cross-bill, and prayed that they might be allowed to come in and defend said suit and made co-defendants herein with said Thomas P. Akers, and that

they might be allowed to adopt his cross-bill and answer as their cross-bill and answer in this cause, and to join with him in his prayer for relief in the premises.

On the third of April, 1876, a receiver was appointed for the property of the Pacific railroad.

On the 5th of June, 1876, the answer of the Atlantic and Pacific railroad was filed. On the 3d of April, 1876, Henry F. Vail and James D. Fish, the trustees in the third mortgage, appeared and asked leave until the first Monday of June, 1876, to plead, answer, or demur to the bill.

On the 25th of April, 1876, Akers, by leave of the court, filed an amended answer and a cross-bill in this cause. (See record, p. 24.)

On the 6th of June, 1876, Henry F. Vail and James D. Fish, by their attorneys, filed their answer to the bill of complaint, in which they admitted the allegations of the bill to be true, and submitted themselves to the judgment of the court, asking that their interests might be protected and that they might have an allowance for costs and attorney's fees.

On the same day Thomas P. Akers, in the county of St. Louis, dismissed their cross-bill and withdrew the answer of St. Louis County, without prejudice to the claim of the county in that behalf.

On the 6th of June, 1876, a decree of foreclosure was rendered by the court (see record, page 41), in which it is recited (record, page 44) "*that the court being fully advised in the premises, and by the consent of all the parties to the suit, through their solicitors of record, thereupon and in consideration thereof, it is ordered, adjudged, and decreed as follows, to wit: That the Pacific railroad stands absolutely debarred and foreclosed of and from all equity of redemption to the said mortgaged premises, property, and franchises, and that the property and franchises as described in the deed of trust or mortgage of July 10th, 1875, be sold at public auction by Seymour D. Thompson, master in chancery of this court, to pay and satisfy the amounts due by the company upon said bonds and any other*

indebtedness which the court may order to be paid out of the proceeds of said sale," etc.

The sale was made by the master in pursuance of the decree and a report thereof filed, and on the 6th of October an order was made confirming the sale.

On the 19th of September, 1876, N. A. Cowdrey, Robert L. Cutting, jr., Peter Marie, Frank A. Otis, Jacob Cromwell, George L. Kingsley, George R. Fearing filed a motion and petition for liberty to intervene to set aside the decree of June 6, 1876, which, on the 22d of September, 1876, was amended, and a copy of which amended petition appears at page 47 of the record.

The parties above named in this motion claimed to represent three million five hundred thousand dollars of stock of the Pacific railroad, in which petition it is averred (see record, page 49) that "on the sixth of June, 1876, when the decree in this case was rendered, or just previous to that time, the county of St. Louis withdrew its answer to the complaint and also a cross-bill filed by them, which was then pending in this case, *without any notice to your orators or to the stockholders of the Pacific railroad: That, also, Thomas P. Akers had filed an answer and cross-bill on his own account and on behalf of other stockholders, and also then pending in this court, and which, on the 6th of June, he withdrew without any notice to the* stockholders represented by him:"—which motion and petition were sworn to by N. A. Cowdrey and Robert L. Cutting, jr.—(See record, page 54.) Which motion and petition for liberty to intervene, made by the said stockholders, were, on the 3d of October, 1876, denied by the court.

On the 6th of February, 1877 (see page 64 of the record), a petition was presented in the name of the Pacific railroad to the Honorable Samuel F. Miller, Associate Justice of the Supreme Court, for an order allowing an appeal in this cause, and which appeal was granted. The exhibit accompanying the petition for an appeal shows that at what purports to be a meeting of the stockholders of the Pacific

railroad, held on the 14th December, 1876, a resolution was passed appointing Messrs. Glover and Shepley solicitors and attorneys for the Pacific railroad, with full power to use the name of the corporation in the prosecution or defence of all suits, bills, writs of error, bills of review, and all other proceedings growing out of the case of George E. Ketchum against the Pacific railroad and others, whether in law or in equity, in which the interests of the company are involved; that it was in pursuance of this resolution passed at a stockholders' meeting, that Messrs. Glover and Shepley claimed the right to act as attorneys for the Pacific railroad, and to pray for an appeal in the name of the corporation. Upon that the petition was filed in the name of the corporation. An order was made by Justice Miller that an appeal be allowed to the Supreme Court of the United States, and a bond was filed by Robert L. Cutting, jr., and Peter Marie, in the sum of one thousand dollars, conditioned that the Pacific railroad should prosecute said appeal to effect, and answer all damages and costs if said appeal is not made good. This order for an appeal did not in fact operate as a *supersedeas*.

At the time of the institution of this suit, the Pacific railroad was indebted in the sum of—

$7,000,000	Secured by first mortgage. At six per cent. interest; payable in gold.
3,000,000	Secured by second mortgage. At seven per cent. interest.
800,000	Secured by the real estate mortgage. At seven per cent. interest.
500,000	Secured by mortgage on the Carondelet branch. At seven per cent. interest.
1,500,000	Income bonds.
2,000,000	Improvement bonds.
$14,800,000	Being the aggregate, exclusive of the claim of the county of St. Louis for $700,000, at seven per cent.—the floating debt of the company and the $4,000,000 of third mortgage bonds.

On the 27th of October, 1876, (see record, page 57,) Seymour D. Thompson, master in chancery, made, by order of the court, a deed to the property sold under the decree of foreclosure to James Baker, the purchaser. The purchaser, James Baker, made the said purchase, as appeared by the report of the master, in his own name, but really as trustee for the bondholders. The bid was really made by Andrew Pierce, for the committee of the bondholders, for the sum of three millions of dollars, but, at his request, James Baker was named as the purchaser; he, however, was merely a trustee, and had no interest in the bonds whatever.—(See page 3. Supplemental affidavits in support of motion to dismiss the bill.) (See, also, the report of the committee of the bondholders of the third mortgage bonds, page 13 of the same paper, in which said committee makes the following report: "In accordance with the instructions of the committee, the property covered by the third mortgage was purchased in behalf of the subscribers to the bondholders' agreement, by Andrew Pierce, in the name of James Baker, for the sum of three millions of dollars.")

The committee of bondholders had, on the day preceding said sale, passed a resolution to the following effect: "Resolved, That the committee, through their representative, will bid as high as three million three hundred thousand dollars for the Pacific railroad and other property thereunto belonging, at the sale of the same under the decree of foreclosure, on the 6th of June."—(See page 10 of the same paper.) This committee had, in pursuance of instructions from the holders of all of the four millions of the third mortgage bonds except about fifty thousand dollars, examined into the condition of the property, and had come to the conclusion that the property subject to the third mortgage was worth only the sum of three million three hundred thousand dollars.

Prior to the decree of June 6th, 1876, N. A. Cowdrey, Peter Marie, Frank A. Otis, George Fearing, Robert L. Cutting, and Jacob Cromwell, claiming to own and hold in

their own right and in trust for others three thousand six hundred shares of the capital stock of the Pacific railroad, it being a majority of the stock of the said company issued, did by themselves and those stockholders whom they represented, make a contract with Cornelius K. Garrison, then owning a large portion of the third mortgage bonds of the company, being the same bonds for the payment of which the decree of foreclosure was made, by which, in consideration that the stockholders would relinquish all further opposition to said forclosure suit, the said Garrison agreed, if he should become the purchaser of the property and franchises of the Pacific railroad at the foreclosure sale, he would organize a new company, and convey to the new company the property so purchased at the said foreclosure sale, and that of the stock of the said new company he would cause to be delivered to them in return for and in lieu of the stock of the Pacific railroad which they held, thirty-six hundred fully paid shares, of the par value of one hundred dollars each, amounting in the aggregate to three million six hundred thousand dollars of the stock of the new company so to be organized, whereupon the said stockholders withdrew their opposition to said decree of foreclosure, and consented to the said decree of foreclosure.—(See page 29 of the motion to dismiss the appeal in this case.)

The stockholders, at this meeting, or a majority of them, were the same persons who called and conducted the meeting of stockholders of the date of December 14th, 1876, at which the resolution was passed authorizing Messrs. Glover and Shepley to act as attorneys for the corporation, the Pacific railroad, and to take an appeal from the decree rendered on the 6th of June, 1876.—(See page 66 of the record in this cause.)

The charter of the Pacific railroad, by an act of the General Assembly of Missouri, approved March 1st, 1851, and amendatory of the said charter, contained the following provisions (see page 268 of the Acts of the General Assembly of Missouri for 1851):

"SECTION 1. Section fourth of the act entitled 'An act to incorporate the Pacific railroad,' is hereby amended so as to read as follows:

"SEC. 4. The stockholders of said company shall meet on the last Monday of March in each year, at such place in this state as may be designated by the by-laws of the company, of which at least twenty days' previous notice shall be given in two or more newspapers published in the city of St. Louis, and elsewhere, if the board of directors see fit, and choose by ballot, by a majority of the votes present, to be given in person or by proxy, thirteen directors, all of whom shall be citizens and residents of this state, and shall be owners respectively of at least ten shares in the stock of said company, and qualified to vote for directors at the election at which they shall respectively be chosen; the said directors, and those thereafter to be chosen in pursuance of the provisions of this act, at their first meeting shall choose, by ballot, one of their own number as president of said company; and the said president and directors shall conduct and manage the affairs and business of said company, until the last Monday of March then next ensuing, and until others are chosen; and may make and establish such by-laws, rules, orders, and regulations, not inconsistent with law, as to them may seem needful.

"SEC. 2. At every annual meeting the said stockholders shall have power to make, alter, or repeal, by a majority of the votes given, any or all such by-laws, rules, orders, and regulations as aforesaid, and do and perform every other corporate act authorized by their charter. The stockholders may meet at such other times and places as they may be summoned by the president and directors, in such manner and form, and giving such notice as may be prescribed by the by-laws, and the president, at the request, in writing, of any number of stockholders, representing not less than one-seventh in number and interest, shall call a special meeting, giving the like notice, and stating specifically the objects of such meeting; and the objects stated in such notice, and no other, shall be acted upon at such meeting; nor shall any business be transacted at any such special meeting, unless a majority of the stock shall be there represented; but the meeting may adjourn from day to day, or until such times as a majority in interest shall be present. So much of section fifteenth of the said act as is inconsistent with the provisions of this section is hereby repealed."

The meeting of the stockholders held on the 14th of December, 1876, under the authority of which meeting this appeal was taken in the name of the corporation, the Pacific railroad, was not an annual meeting, nor the adjournment of an annual meeting, but one called in pursuance of a notice given by publication in the newspapers by Jos. L. Stephens, the chairman of the annual stockholders' meeting, held on the last Monday in March, 1876.—(See page 14 of the motion to dismiss the appeal.)

Perhaps the most concise and accurate statement of the history of this case will be found in the report of the judges of the circuit court in the case *Ex-parte* Cutting, reported in vol. 94 U. S. Rep., p. 14, as follows:

"The original bill of foreclosure was filed November 11th, 1875, by said George E. Ketchum on his own behalf and on behalf of all others holding third mortgage bonds against the Pacific railroad, a corporation created under and by virtue of the laws of the State of Missouri, and against the Atlantic and Pacific Railroad Company, a corporation created and organized under and by virtue of an act of the Congress of the United States, approved July 27th, 1866, and at the several times thereinafter mentioned engaged in operating and maintaining a railroad in the State of Missouri, and against James Baker, Rufus J. Lackland, and Dwight Durkee, citizens of the State of Missouri, and Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett, and Luther C. Clark, citizens of the State of New York.

On January 8th, 1876, T. P. Akers, purporting to be a stockholder of said Pacific railroad, filed his motion for leave to answer, and on February 7th, by leave filed his answer and cross-bill.

On March 10th said Akers filed a motion to withdraw his said answer and cross-bill, which on April 3d of said year was granted. On said 3d day of April leave was given to St. Louis County to file a separate answer and to said Akers to file a new cross-bill and for said county to join in said cross-bill.

On April 25th said Akers filed his answer and cross-bill, and also said St. Louis County.

On June 5th said Durkee and Lackland, Murdock, Clark, Morgan, Joseph Seligman, Baker, and Jesse Seligman, also

the Atlantic and Pacific Railroad Company, filed their answers.

On June 6th, 1876, Fish and Vail answered, and on the same day said Akers and said St. Louis County withdrew their answers and dismissed their cross-bills, both said Akers and said St. Louis County purporting to act for themselves as stockholders and for all other stockholders who might join with them.

Thereupon all parties of record being duly represented in court consented to the decree of foreclosure and sale of the date June 6th, 1876.

On September 18th, to wit, the first day of the regular September term of said circuit court, a motion was filed to confirm the sale previously made by the master under the decree of June 6th, 1876, a report of which had been filed on September 15th preceding.

On September 19th said petitioners, before the Supreme Court of the United States, filed in the said circuit court a motion for leave to intervene, as also did Mary R. Miltenberger, claiming to be a stockholder of said Pacific railroad.

On September 22d said petitioners filed an additional motion to intervene.

On the third day of October said several motions to intervene were denied on two grounds, to wit:

First. That the decree of June 6th, 1876, was a final decree, and having been rendered at a prior term of the court, it was beyond the power of the same court to set it aside or change or modify it.

Second. Were this otherwise, the petitioners were guilty of laches which should deprive them at that late day of any supposed right to intervene in order to contest the original merits of the plaintiff's right for a foreclosure as decreed at the preceding term.

This was the more apparent from the fact that Cowdrey, one of the petitioners, also T. P. Akers and ——— Vogel, for themselves and such stockholders as might join, had, on the 13th day of November, 1875, filed in said circuit court an original bill to invalidate the mortgage sought to be foreclosed in said suit by said Ketchum et al.

After appearance to said bill of Cowdrey and others, and before answers thereto, the same was dismissed as to said Akers and Vogel on December 11th, 1875, on their motion.

On January 7th, 1876, said Cowdrey filed an amended

bill, to which answers were filed by some of the defendants on February 5th, 1876.

On February 7th, 1876, a second amended bill was filed by said Cowdrey. To said second amended bill answers were filed by some of the defendants, and demurrers by other defendants, on February 7th, March 11th, March 20th, and by leave on September 13th.

No motions or other proceedings were ever had on said bill of Cowdrey, nor any matters therein set down for hearing or testimony taken.

It was thus apparent to said circuit court that said Cowdrey, for himself and other stockholders who might have joined in said bill, had taken no proper steps to advance the same for hearing or for the consideration of any matters therein involved, with the required diligence.

It also appears that said Akers and St. Louis County, in said bill of Ketchum et al. vs. The Pacific Railroad et al., had, on behalf of themselves and such other stockholders as might join therein, answered and filed cross-bills for the same purpose as said Cowdrey had filed his original and amended bills.

Thus said Cowdrey and all other stockholders who might join with him were in court during all the proceedings of the term when the decree of foreclosure and sale was entered, and had had the fullest opportunity to intervene by joining in the answers and cross-bills filed by said Akers and said St. Louis County, and otherwise.

Still, neither he nor any of the petitioners herein objected to or in any manner interposed against the said consent decree of June 6th, 1876."

The respondents, therefore, say:

First. That no appeal was in fact ever taken by the Pacific railroad, the corporation which made and executed the bonds and the third mortgage to secure the payment of the same.

Second. That no appeal could legally be taken by said corporation, because the said company had consented to the decree, and to the existence of all the facts which authorized the court to render the decree of foreclosure in this cause.

Third. That it does not appear from the record in this cause or from any fact legitimately before this court, that

the corporation was deceived or defrauded either by the bondholders or by any of its own officers or agents; and if there are any facts going to show fraud or collusion in the procurement of the decree outside of the record, the only remedy of the parties in interest, whether stockholders or others, is by bill of review or other proceeding before the circuit court.

Fourth. That the record in this cause shows that the court had full jurisdiction of the case and of the parties, and that a proper case was made by the pleadings to entitle the complainants to a decree of foreclosure.

I.

The only authority upon which the name of the Pacific railroad was used in taking this appeal, is to be found in the proceedings of the stockholders' meeting of December 14th, 1876, which is attached to the petition as Exhibit "A," as appears at page 65 of the record; the power of the stockholders to act in this respect is based on the first clause of the second section of the charter, and is as follows:—

"At every annual meeting, the said stockholders shall have power to make, alter, or repeal, by a majority of the votes given, any or all such by-laws, rules, orders, and regulations, as aforesaid, and do and perform every other corporate act authorized by their charter."

The claim set up by the stockholders under this provision of the charter would authorize them to manage all the affairs of the corporation. All that would be necessary for this purpose would be simply to adjourn from day to day or authorize some officer to call the stockholders together—at any time he might think proper. In other words, the effect of this construction would be to dispense altogether with the board of directors. The first section of the charter provides that "the said president and directors shall conduct and manage the affairs and business of said company, * * * and may make and establish such by-laws, rules, orders, and regulations not inconsistent with law, as to them may seem needful."

The construction contended for would dispense with the necessity for electing a board of directors at all, or else it would create two bodies, both of which would have power to manage and conduct the affairs of the corporation. What might be done by the board of directors at one i me in making contracts, employing agents, and performing their corporate duties, might the next day be changed by the stockholders, and thus infinite confusion would be created in the conduct of the business of the corporation.

A reasonable construction of the second section in connection with the provision of the first section would be that we should confine the extraordinary power claimed by the stockholders to the period of their annual meeting. The stockholders, of course, have the power to appoint all the agents of the corporation, but the period of time has been fixed by the charter when they may exercise these powers in the appointment of directors, and do any other corporate act which may be thought beneficial to the corporation. But when they have appointed a board of directors who, under the express provisions of the charter, have the power to "conduct and manage the affairs and business of the company until the last Monday in March then next ensuing," that is, until the next annual meeting of stockholders, they have vested in those directors a power which they have no authority to interfere with or control until the expiration of twelve months from the time at which they have been vested with such power. In other words, the power vested in the directors by the charter, to be exercised by them, terminates on the first Monday in March then next ensuing, at which time, it being the period of the annual stockholders' meeting, as provided for by the charter, the stockholders then have power to make by-laws, rules, orders, regulations, and do and perform every other corporate act authorized by the charter until they have elected a new board, and so soon as this new board is elected and qualified, they immediately become possessed of the powers vested in the board of directors by the terms of the charter.

This construction is perfectly consistent with the language of the act, and it recognizes the full power in the first instance on the part of the stockholders to control the affairs of the company.

James Baker, it appears from the whole record in this case, was the attorney of the company at the time of the institution of this suit and continued to be so, at least as late as December 14, 1876, after the judgment of foreclosure and after the sale of the property under the decree. And it was at the stockholders' meeting of December 14th, 1876, that they undertook, in the name of the Pacific railroad, to remove him as attorney of the corporation.—(See page 66 of the transcript.)

On the 20th of March, 1876, the day after the annual stockholders' meeting, a new board of directors was organized, and a resolution offered to appoint Messrs. Glover and Shepley as attorneys for the corporation, which received only two votes out of thirteen in the board.—(See page 16 of motion to dismiss.)

Baker, as attorney for the corporation, consented to the decree, and the corporation has never, acting through its board of directors, called in question the propriety of his action, and there is nothing in the record in this case to show either that he acted improperly or that any one authorized by the Pacific railroad to complain of his acts, did so complain.

The Pacific railroad has never, through its authorized attorney, or in its own name, applied for this appeal, except through the actions of this stockholders' meeting. Neither the board of directors nor the stockholders constitute the corporation, but both the board of directors and the stockholders may, in certain contingencies, act for the corporation and in the name of the corporation. The board of directors are the agents of the corporation in the general transaction of its business, not only under the general principles of law, but under the provisions of this charter. The stockholders may also act for the corporation, and when

they so act may, as well as the directors, be considered as agents for the corporation; but the corporation is itself a distinct legal entity, separate and distinct as well from the stockholders as from the board of directors, and the question presented in this case is, which of these agencies was authorized to act for the corporation and in its name in the conduct and management of this suit. During the conduct of the suit and up to the time of the final decree, the board of directors were authorized to act and appoint attorneys. After the judgment was rendered the stockholders claimed the authority to act as agents for the corporation, which authority we deny.

But we say further, that the meeting of December 14th was neither an annual meeting nor the adjournment of an annual meeting. The evidence shows (see page 14 of motion to dismiss) that this meeting of December 14th was called by the chairman of the stockholders' meeting in March, and that notice was given by publication in the newspapers. Now, the charter provides for only two other modes of calling a stockholders' meeting, after the annual meeting: 1st, by the president and directors, in such manner and form as may be prescribed by the by-laws; and, 2d, by the president of the board of directors at the request of any number of stockholders representing not less than one-seventh in number and interest, and by giving a notice in which shall be stated specifically the objects of the meeting; and that the objects stated in such notice, and none other, shall be acted upon at such meeting. So that in no sense was the meeting of December 14th such a meeting as was contemplated by the charter, and, therefore, the acts of such stockholders are simply void.

II.

A consent decree cannot be appealed from.—(Winchester against Winchester, 121 Mass., p. 128.) In which this court says the decree appearing to be made by consent, the appeal cannot be sustained, the only way the party in such

case can have the matter reviewed is by a rehearing or by a new bill, citing Downing against Cage; also, First Equity Cases Abridged, p. 165, and Monell against Lawrence, 12th Johnson, 521. In the case of Armstrong against Cooper, 11th Ills., 540, the court held that a consent decree cannot be appealed from, nor can error be properly assigned upon it; even a rehearing cannot be properly allowed on the suits.

In the case of Murphy against the American Life Insurance and Trust Company, the appeal is taken as confessed, and after an account the report of the master was confirmed and a decree made for the sale in open court, the counsel for the appeal being present and making no opposition. This was a case of a motion to dismiss an appeal and the foregoing facts appear from the affidavit on which the motion was filed. The motion was sustained and the appeal dismissed.—(See 25 Wendell, p. 249.)

See, also, case of Monell against Lawrence, 12 Johnson, p. 529.

The facts in this last-named case were these: "The respondent, William Lawrence, having a mortgage against William W. Sackett, and the defendant Monell having two judgments against Sackett, and the defendant Wood having a deed of the mortgaged premises from Sackett, in trust for his creditors, the respondent filed his bill to foreclose the mortgage; upon which the parties, by their respective solicitors, on the 6th of March, 1813, entered into an agreement that the mortgaged premises should be sold under the direction of a master in chancery, on, or after, the 15th of May, then next, and the proceeds paid into the court of chancery; out of which Lawrence was to be paid the sum due him; and the rights of Monell, Wood, and Sackett to the surplus of such proceeds to be preserved to them respectively.

A decree was thereupon entered pursuant to this agreement, and a reference made to a master 'to ascertain the sum due on the mortgage and to proceed to a sale of

the mortgaged premises.' A motion was afterwards made to set aside the decree. The court says: 'There is another objection to the mode adopted by the appellant to obtain relief in the court below. * * Even if an application for relief could in any way be sustained, it is an attempt to set aside, upon motion, a decree entered by consent of parties. This is against the established mode of proceedings in chancery. The case of Harrison against Rumsey came before the court upon petition, and Lord Hardwicke said he would by no means set aside a decree obtained by consent of counsel on both sides, for it would be most dangerous, and it was an established rule not to do it, nor would he make the precedent.'

'There was,' he said, 'a good while ago an appeal of that kind in the House of Lords, who desired the party to bring an action against the counsel; if they could prove collusion on the counsel it would be a different thing; and in the case of Bradish against Gee, the same Lord Chancellor said: where a decree is made by consent of counsel, there lies not an appeal or rehearing, though the party did not really consent, but his remedy is against his counsel. But if such decree was by fraud and covin, the party may be relieved against it, *not by rehearing or appeal, but by original bill.*'

The case of Webb against Webb, 3rd Swanston, was a controversy between a father and son, at which the son proved his case. The Master of the Rolls who heard it mediated an agreement, and both subscribed their consent to the minutes. After this, the father brought a bill of review to reverse this decree. The bill was dismissed; for, says the court: "There can be no error in a decree by consent, *Consensus tollit errorem*,—there can be no injustice in a decree by consent."—(See, also, Bradish against Gee, First Ambler's Chancery Reports, p. 229.) In which it is held that a party cannot appeal from a decree made by consent, citing a number of authorities on that point from the English Reports.

In the case of Terry against The Commercial Bank of Alabama, 92 United States Reports, p. 454, this court held that where, after a final decree on the merits had been rendered upon the report of the receiver, and upon the report of the master to whom it had been referred, all of which had been confirmed without exception, and the complainant filed a petition supported by his affidavit asserting that his solicitor had deserted his interest but had failed to except to the reports and improperly consented to the decree, it was held that this court cannot consider the alleged errors of that report of the master or review the action of the court below in refusing to set aside the decree upon an application addressed to it. In this case the court says: "If an appellant alleges that he has been defrauded by his counsel he must sue them for what he has lost by the fraud." This was not a consent decree, but it shows that the party is bound by the action of his counsel, and if his counsel have defrauded him he must sue them for what he has lost by the fraud.

In the case of Thompson vs. Maxwell, 95 U. S. Reports, p. 397, this court says: "If the appeal in this case is to be regarded as a bill of review, and in its ultimate aspect it seems impossible to regard it otherwise, the proceedings are clearly objectionable on the following grounds: First, the decree sought to be set aside and reversed was a consent decree. It is a general rule that against such a decree a bill of review will not lie.—(Citing Webb against Webb, 3d Swanston; also 2d Smith's Chancery, p. 50, and Daniel's Chancery Practice, 1629.)

It is claimed by the appellants in this case that the decree is defective because it provides no time, place, or terms for the redemption; and that the principal debt was not due at the time of the decree, as appears from the decree itself.

The rule requiring that the decree should give time for redemption applies specifically to what are called strict foreclosures, and not to bills or suits to foreclose, where the

prayer asks for the sale of the property and the payment of the debts out of the proceeds. "A strict foreclosure was the natural remedy upon a mortgage when it was regarded as a conditional sale of the land rather than as a mere security, for the mortgagor having failed to perform the conditions, it was consistent with this doctrine of the condition that the court should, after having relieved the mortgagor from the forfeiture of his condition, require him to perform it in reasonable time, or be forever debarred from his right to redeem."—(See Jones on Mortgages, vol. 2, sec. 1539, *second edition.*)

[But when the mortgage could be regarded as a security for the payment of a debt, and the mortgagee had the right to resort to his security, the remedy was to sell the property secured and apply the proceeds to the payment of the debt. In this way the debtor would have the benefit of the estate if it were greater than the amount of the debts, and the mortgagee would have a claim for deficiencies not paid by the proceeds of the sale.]—(See Lansing vs. Goellete, 9 Cowan, page 352.)

In a case of strict foreclosure a term for redemption is always allowed in the decree.—(See Jones on Mortgages, vol. 2, section 1655.)

A decree of strict foreclosure bars the defendants of all rights, titles, and equity of redemption, unless they redeem and pay the mortgage within a day certain therein fixed, usually six months from the day of the judgment.—(See Jones on Mortgages, vol. 2, section 1651; also Farrell against Parlier, 50 Ills., p. 274.)

The case before the court was a case of strict foreclosure. —(See Clark against Rayburn, 8 Wallace, p. 318.)

In the case just cited the court decreed that all the defendants should be forever barred and foreclosed of their rights of redemption in the mortgaged premises. There was no order of sale, no finding of any amount, nor any day given for redemption. It was a case of strict foreclosure, by which Mrs. Clark and her trustees, the defend-

ants in the case, were foreclosed of their right of redemption. The court, in rendering the decree in this case, used this language: "Can a decree of strict foreclosure, which does not find the amount due, and which allows no time for the payment of the debt and the redemption of the estate, and which is final and conclusive in the first instance, be sustained?" and the court held that the decree was bad and could not be sustained.

The statute law of Missouri, which must govern in regard to this mortgage, provides for a mode of foreclosure by petition to the circuit court against the mortgagor and the actual tenant or occupiers of the real estate, setting forth the substance of the mortgage deed and praying that judgment may be rendered for the debt, and that the equity of redemption be foreclosed and the property sold to satisfy the amount due.—(See Wagner's Statutes 1872, pp. 952, 957.)

But in Missouri a strict foreclosure is not allowed.—(See Davis against Holmes, 55 Missouri, p. 349.)

Default in the payment of interest at the time stipulated in the mortgage gives the right to foreclose immediately, although the period for the payment of the principal sum has not arrived, and there is no provision specifically making the forfeiture of the principal on default of the payment of the interest.—(See Jones on Mortgages, vol. 2, p. 1177; also, Burrowes against Maloy, 2d Jones and LaTouche, p. 526,) in which last-named case Lord Chancellor Sugden says:

"Suppose that the principal sum be made payable on a given day, no matter whether it was one year or twenty years after the date of the mortgage, with interest thereon, payable half-yearly, and that before the payment of the principal money default was made in the payment of the interest thereon, the mortgagee would at any time after that date have the right to file his bill for a foreclosure, because his right became absolute at law by the non-payment of the interest, the estate having been conveyed subject to a condition which had not been fulfilled."

(See, also, on this point Gladdin against Hitchman, 2d Vernon, p. 135.) But even if this were not so, yet if it can be gathered from the instrument itself that it was the intention of the parties that the persons for whose benefit the mortgage was made shall be entitled to a foreclosure before the day of payment of the principal sum upon default of the payment of the interest or any part of the principal, the right to foreclose exists at the time of the non-payment of the interest, and judgment may be entered in the case for the whole debt.—(See Jones on Mortgages, vol. II., fol. 2d, Section 1180. Also, Pope against Durant, 26 Iowa, p. 223.)

III.

We have shown in this case that upon the face of the bill the decree was such as might properly have been rendered. In other words, that it is not subject to demurrer for want of equity; and that, even if this were not so, that the decree being by consent the doctrine of *consensus tollit errorem* fully applies. And the next question is, whether there is anything appearing in the record in this case which shows any fraud or collusion in procuring this consent, or in obtaining the decree that was rendered. In this case the record proper consists of the bill, answers, decree, order, and report of sale, and order confirming the decree and sale. There is nothing else in the record. This court has said in Pacific Railroad vs. Ketchum, 95 U. S., p. 1, which is this very case, that "appeals in equity are heard upon pleadings and proofs below; no new evidence can be admitted and the pleadings cannot be amended in this court." The petition of persons asking to be made parties to the suit, and whose application was refused, constitutes, strictly speaking, no part of the record, nor can any of the statements or averments contained in those petitions be properly considered by the court as any evidence affecting the character of the decree. None of the parties who were made defendants upon the record have resisted the prayer of the bill.

On the 25th of March, 1876, Peter Marie and others asked to be allowed to come in and defend the suits and be made co-defendants with Akers (see page 19 of the record); but in this petition there is not even an averment of fraud against anybody. Akers and the county of St. Louis, who were made parties to the suit as stockholders on the day upon which the decree was rendered, withdrew their opposition to it, and it was not until long after the decree was rendered and the sale actually made, and at the next term of the court that the committee of stockholders, consisting of N. A. Cowdrey and others, presented their petition for liberty to intervene to set aside the decree, and for liberty to demur, answer, plead, or appeal as advised. This petition was presented on the 19th September, 1876, and an amended petition presented on the 22nd September, 1876. —(See page 47 of the record.) So that in fact the petition presented by these parties constitutes no part of the record proper, nor can the averments contained therein be considered in determining the propriety of the decree which was rendered. The court, therefore, can only look at the bill and answers of the parties to the suit to determine whether there was anything connected with the rendition of the decree by which it could be properly impeached. What transpired afterwards can have nothing to do with the impropriety of the action of the court in rendering the decree. It is absurd, therefore, to say that anything done by Baker, the attorney for the Pacific railroad, after the rendition of this decree, could in any manner whatever affect its validity. The fact that he became the nominal purchaser of the property at the sale, whether his conduct in that particular was proper or improper, can have nothing to do with the rendition of the decree itself, by which that sale was ordered; but we can see no impropriety in the fact that after the decree was rendered, the order of sale made, that Baker should become the purchaser because he was the attorney of the defendant whose rights had been concluded by the decree. Certainly the defendant in an execution, or

his attorney, may become the purchaser of property at the sale under the execution. If he had been the attorney for the complainant, and had bid the property in, he might have held as a trustee for the complainant; but there is nothing in the relation of attorney and client which forbids the attorney for the defendant from buying in property at an execution sale.

It has been held by this court that a director of a corporation may purchase property sold under execution or under a decree of foreclosure; the sale is not void, but at most it is merely voidable, at the election of the party whose interest he may have represented.—(See Twinlake Oil Company against Marburry, 91st U. S., p. 589.) In this very case, however, before the court, this court has already declared (see 95th U. S., p. 1) that the sale to Baker was not objectionable, and that although he was in form the attorney of the appellant, it was in reality in the interest of the bondholders, in whose interest the foreclosure was made. There is nothing, therefore, in the record of this case that affords any evidence of fraud or collusion in procuring the decree, and it is simply ridiculous to refer to what was done afterwards for the purpose of impeaching it.

IV.

The court had full jurisdiction of the parties and the subject-matter of this decree.

The jurisdictional averments in the bill are as follows:

"Humbly complaining, shows unto your honors, your orator, George E. Ketchum, a citizen of the State of New York, who brings this bill of complaint against the Pacific railroad, a corporation created under and by virtue of the laws of Missouri, and against the Atlantic and Pacific Railroad Company, a corporation created and organized under and by virtue of an act of Congress of the United States, approved July 27, 1866, and at the times hereinafter mentioned, engaged in operating and maintaining a railroad in the State of Missouri, aforesaid, against James Baker, Rufus J. Lackland, Dwight Durkee, citizens of the

State of Missouri, and Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett, and Luther C. Clark, citizens of the State of New York."

The objections made on the question of jurisdiction are, that Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett, and Luther C. Clark are citizens of the State of New York, the same state of which the complainant is a citizen. Of these parties, Murdock, Punnett, and Clark, are trustees under the first mortgage, in regard to which it is averred in the bill that the interest has been duly and regularly paid upon the bonds which that mortgage was intended to secure; that no interest is due thereon, nor will any interest mature until January 1st, 1876, and no decree is asked against them nor any issue tendered which would make them parties in controversy in this suit. The same may be said in regard to Morgan and Joseph Seligman, trustees under the second mortgage, and so in regard to Jesse Seligman, trustee under the Carondelet-branch mortgage.

This disposes of all the parties named as defendants except Henry F. Vail and James D. Fish, under the third mortgage. In regard to them it is averred that application has been made by the complainant, on behalf of himself and other bondholders, to these trustees to take proceedings to foreclose the said third mortgage and to protect the interests of the bondholders, but no proceedings have been had, and that the trustees express doubts whether, under the mortgage, they have the right to institute any proceeding under the same by reason of non-payment of interest, and for that reason prefer not to take such proceedings; but no decree is asked as to them, nor is any issue tendered. It is not alleged that they have violated their trust or that they have refused to execute it, nor is the court asked to compel them to execute the trust. They are, doubtless, indispensable parties to the suit, because they hold the legal title to the property, but they are not parties in controversy

in the suit, nor could they be under the averments in the bill; and really, so far as this controversy was concerned, as to whether the Pacific railroad should be compelled to pay the debt which had fallen due by the foreclosure and sale of its property under the mortgage, they might properly be arranged as parties plaintiff to this controversy.

"After the default in the payment of interest by the corporation, the trustees represented the beneficiaries in all things relating to their common interest in the trust property. The beneficiaries are not even necessary parties in a proceeding to protect their interest."—(See Kerrison against Stewart et al., 93 United States, p. 160.) In this case the court said that the principle which underlies this rule has always been followed in proceedings relating to railway mortgages, where a trustee holds the security for the benefit of the bondholders; but in this case the beneficiaries themselves were the parties to the suits, and entitled to ask that protection which could have been asked by their trustees, so that in fact the trustees were merely nominal parties in the attitude in which they stood. Taking the averments in the bill to be true, they had no controversy and could have no controversy with their beneficiaries; it was their duty to protect the interests of the beneficiaries, there having been a default in the payment of interest, and they could not and did not resist the decree asked for by the bill.

In the case of The Board of Commissioners of Arapahoe County vs. The Kansas Pacific Railway Co. and others (4th Dillon, p. 378), the plaintiff, a citizen of Colorado, brought a stockholder's bill in a state court in Colorado, making defendants thereto the railroad company, (also a citizen of Colorado,) in which the plaintiff was a stockholder, namely, the Denver Pacific Railway Company, and also the directors thereof, including two directors, citizens of Colorado, against whom, however, no charges were made and no relief asked; also making a defendant another railroad company, namely, the Kansas Pacific Railway Company, (citi-

zens of Kansas,) and certain individuals, all citizens of other states than Colorado. The object of the bill was to secure an accounting in favor of the Denver Pacific Company against the Kansas Pacific Company, and to secure a decree *in personam* against the non-resident directors of the Denver Pacific Company. The Kansas Pacific Company and the individual defendants connected with that company, without being joined with the other defendants, applied to remove the suit to the circuit Court of the United States, under the act of March 3d, 1875:—held that the suit was removable. Mr. Justice Miller, in this case, in commenting on the objections raised to the removal of the cause to the federal court, says:

"The objection is that the Denver Pacific Railway and Telegraph Company, Sayre, and Moffat are citizens of the same state with the complainants in this action. This objection, as before stated, has always been considered decisive against the jurisdiction of this court; that unless the parties on each side, each and all of them, have the required citizenship, this court is without jurisdiction. If the complainant and defendant were both citizens of the same state, this court had not jurisdiction. It is further alleged, in support of the objection to the jurisdiction of this court in this case, that the Denver Pacific Railroad Company and Sayre and Moffat, each of them, are *necessary* adverse parties to the complainants in this suit. The objection, if well taken, will require the suit to be remanded.

"The reply is that the Denver Pacific Company and Sayre and Moffat are nominal parties, against whom no relief is sought, and against whom no decree can be rendered; that the bill is clear and specific on that point, consequently the right which belongs to the other party to remove the case shall not and cannot be defeated by the joinder in the petition of the other defendants, citizens of the same state with the complainants, against whom no relief is prayed. As regards Sayre and Moffat the case seems very clear. A careful reading of the bill shows that no relief can be had against them. No case is made in the bill against them, nor does it appear that any was intended to be made. They are carefully distinguished from the other trustees against whom the relief is asked. No relief is

asked against the corporation of which they are directors, nor is the relief asked against all the directors of the road. Not only so, but the complainants are very careful to show in their bill that there is no cause of action, or anything asked against these two directors. The charges are against the majority of the board of trustees of the Denver Pacific Railway Company. The decree asked is a decree *in personam* against the majority of the trustees, and not against the whole board. It is perfectly clear that no possible decree can be had nor any charge of misconduct or maladministration be sustained against Sayre and Moffat, as nothing is alleged against them. They are, therefore, entirely immaterial parties, and may be regarded as out of the case.

* * * * * * *

"The case, then, rests upon the question of whether the fact that the Denver Pacific Railway Company is a party defendant, and is a citizen of the same state of the party plaintiff, ousts the jurisdiction of this court or defeats the right of removal of the other parties who are citizens of other states. That question does not rest upon the same principle as the case of Messrs. Sayre and Moffat. The Denver Pacific Railway Company *is* a necessary party to this suit; it is one without which the suit cannot proceed. The main object of this suit, aside from obtaining a temporary injunction and the appointment of a receiver, is to obtain an accounting with the Kansas Pacific Railway Company and other defendants, on an allegation that a majority of the trustees of the Denver Pacific Railway Company have been committing frauds, and thus depriving that company of the funds belonging to it. The relief sought is an accounting, and the relief asked is a decree in favor of the Denver Pacific Railway Company for the amount found due on that accounting. The Denver Pacific Railway Company is a necessary party to that accounting. * * * * But, as already stated, the main relief sought in this case will be, if the suit is successful, a decree in favor of the Denver Pacific Railway Company for the amount found due from the other defendants in this case. * * * * The flexibility of the mode of proceedings in a court of chancery is such, that for the attainment of justice you may, in some instances, where the party is not before the court, make him a defendant when he will not be a plaintiff. You cannot compel him to hazard the result of a defeat, though his presence in the court may be necessary for

the rights of somebody else, and his rights be with the plaintiff in the case. In suits at common law he would be there as plaintiff, if there at all. By the rules and practice in equity, the court allows him to be defendant in the case; but the mere fact that he is placed as defendant instead of plaintiff in an action of chancery, never changes his relation to the controversy in the case, and it is very clear that the interest of the Denver Pacific Railway Company is the interest of the plaintiffs. * * * * Now, the controversy in this case is one in which the commissioners of Arapahoe County and the Denver Pacific Railway Company are on one side, citizens of the State of Colorado, against all the other defendants. * * * * * * The best judgment I am able to give is that this is a controversy between citizens of the State of Colorado on one side, and citizens of other states on the other side, and is properly subject to removal."

In the recent case of Meyer against The Construction Company, this court seems, however, to have acquiesced in the reasoning of Judge Miller in the Arapahoe County case. It says:

"The act of March 3, 1875, (18 Statutes, 470,) was in force when the application for removal was made, but not when the new trial was granted to Dennison.

"The second section of that act contains, among others, the following provision:

"'That any suit of a civil nature, at law or in equity, now pending * * in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, * * in which there shall be a controversy between citizens of different states, * * either party may remove said suit into the circuit court of the United States for the proper district.'

"This we understand to mean that when the controversy about which a suit in the state court is brought, is between citizens of one or more states on one side, and citizens of other states on the other side, either party to the controversy may remove the suit to the circuit court, without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purposes of a removal the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute. If in such arrangement it appears that those on one side are all

citizens of different states from those on the other, the suit may be removed. Under the old law the pleadings only were looked at, and the rights of the parties in respect to a removal were determined solely according to the position they occupied as plaintiffs or defendants in the suit.—(Coal Company vs. Blatchford, 11 Wall., 174.) Under the new law the mere form of the pleadings may be put aside, and the parties placed on different sides of the matter in dispute, according to the facts. This being done, when all those on one side desire a removal, it may be had if the necessary citizenship exists."

The two cases are parallel, with this difference only: that in the case before the court the beneficiaries can act for themselves, whereas in the Arapahoe County case they can only seek redress through the corporation; but in both cases the interests of the parties named as defendants were really with the plaintiffs.

When the court speaks of arranging the parties on opposite sides of the controversy, according to the facts, it means, of course, an arrangement in the mind of the court, and not an arrangement by dismissing unnecessary parties or changing the attitude of the parties upon the record, by order of the court, because it speaks of the new law as contradistinguished in this respect from the old law, where the pleadings only were looked at and the rights of the parties in respect to a removal were determined and controlled according to the position they occupied as plaintiffs or defendants in the suit.

The opinion of this court in the case of Meyer against The Construction Company, delivered at this term, is, we maintain, decisive of the question of jurisdiction raised in this case. The controversy, and the only controversy which could arise under the pleadings, was whether the complainants were entitled to a decree of foreclosure against the defendants, the Pacific railroad, a corporation created under the laws of the State of Missouri. The first section of the act of March 3d, 1875, which defines the original jurisdiction of the United States circuit courts, contains the

same language with the second section on the subject of the removal of causes to the federal court. That section declares as follows:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States or treaties made or which shall be made under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects."

The language of both statutes is the same; the question of jurisdiction is determined by the nature of the controversy as developed by the pleadings. Justice Strong, in the case of Taylor against Rockafellow, decided in the Circuit Court for the Western District of Pennsylvania, says:

"To the bill, with its exhibit, the answer, and the petition for removal alone can we look, for the controversy, between the parties so far as it bears upon our jurisdiction." (See Central Law Journal, November 1st, 1878, p. 349.)

Since the late decision of this court above referred to, it would seem useless to press upon this court the further question as to whether the controversy necessary to give jurisdiction in a suit should be wholly between citizens of different states, or whether they may entertain jurisdiction in a cause in which, although there may appear to be a controversy between citizens of different states, yet there are other parties to the suit between whom no such controversy exists, because in this case, so far as there can be any controversy, it was wholly a controversy between citizens of different states; but as this question has not yet been passed upon by the court, and as it might be considered that we were in error in stating that the controversy is

wholly between citizens of different states, I would briefly call the attention of the court to the consideration of this question.

The provision of the Constitution is as follows:

"Article III., section 2d. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects."

The eleventh section of the judiciary act of 1789, or so much thereof as relates to this question, provides as follows:

"Section eleven. The circuit court shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the suit is between a citizen of a state where the suit is brought and a citizen of another state."

It will thus be seen that the act of 1875 grants to the federal courts the full measure of judicial power provided for by the Constitution.

The intention of the framers of the Constitution, in the adoption of the provisions in regard to controversies between states and between citizens of different states, is well expressed by this court in the case of Gaines vs. Fuentes and others, 2 Otto, 18:

"The Constitution imposes no limitation upon the class of cases, involving controversies between citizens of different states to which the judicial power of the United States may be extended, and Congress may, therefore, lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary. * * * This provision of the Constitution had its existence in the impression that state attachments and

state prejudices might affect injuriously the regular administration of justice in the state courts. * * And the excitements and enmities growing out of the late war induced Congesss to pass the act of March 2d, 1867, which made provision that either a plaintiff or defendant might remove a case, where the controversy exceeded the sum of $500, who would make affidavit that from prejudice or local influence he would not be able to obtain justice in the state courts."

And the Federalist, in commenting upon this clause of the Constitution, says:

"In order to the inviolable maintenance of the equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded."—(No. 80.)

It should be the object of every government to secure to all its citizens an impartial tribunal before which all controversies may be determined, and it was evidently for the purpose of providing such a tribunal that these clauses were inserted in the Constitution. The state governments are the governments of the citizens of the respective states, and their judicial tribunals are primarily to determine all controversies between those citizens, but the federal government is the government of all the citizens of all the states. The government of one state is in respect to every other state and its citizens a foreign government, but the national government belongs to all, and is the home government of every citizen of every state, and is, therefore, presumed to be impartial in regard to all. Why, then, should the existence of other controversies in the same suit, though they happen to be between citizens of the same state, deprive the

citizens of different states of the right to have their disputes settled before tribunals which are common to all the parties to the suit? This construction would secure an impartial tribunal to all, whereas the other construction would remit the controversy to a state tribunal where state attachments and state prejudices "might affect injuriously the regular administration of justice."

The judiciary act of 1789 confined this jurisdiction to *suits between citizens of different states*, or rather, to a "suit between the citizen of the state where the suit is brought and a citizen of another state," and the courts have held that all the parties named as plaintiffs must be citizens of one state, and all the parties named as defendants must be citizens of another state, and this because the technical definition of a suit according to the rules of the common law required it, but now, by the language of the act of 1875, the jurisdiction is given "of all suits * * in which there shall be a controversy between citizens of different states," so that the first question which arises in determining the question of jurisdiction is not whether the suit is one between "a citizen of the state where the suit is brought and the citizen of another state," but whether in the suit brought there appears to be a controversy between citizens of different states; that is, a controversy between a citizen of one state and a citizen of another.

Of course none of the adjudications referred to under the judiciary act of 1789, can have any bearing upon the proper construction of the act of 1875.

Nor is the case of Gardner vs. Brown, 21 Wallace, p. 40, an authority in point. This was an application for removal under the removal act of 1866, and the act of 1866 was substantially the same as the judiciary act of 1789, the language of the act being: "If in any suit in any state court against an alien, or by a citizen of the state in which the suit is brought against the citizen of another state," &c. The act then goes on to provide for *removal* of *causes* at *any time before trial or final hearing of the cause.*

This court says, in the "Sewing Machine Cases," 18 Wall., p. 585, in commenting upon the removal act of March 2d, 1867, amendatory of the act of 1866, that "a suit by a plaintiff against a defendant" must mean substantially the same thing, in a practical sense, as "a suit in which there is a controversy between the parties," as each provision includes the word suit, which applies to any proceeding in a court of justice in which the plaintiff pursues his remedy to recover a right or claim. But with all due deference, the act of 1875 does not say "a suit in which there is *a controversy between the parties*," but it says "a suit in which there is a controversy *between citizens* of different states. This controversy may be between some of the parties only, and the requirements of the law to give jurisdiction would be fully complied with;" and we submit that it is not a fair construction of the act of 1875 to hold that when the act says "in which there shall be a controversy between citizens of different states," it must necessarily mean a controversy between all the parties to the suit. If the law had said "a suit where the controversy is between citizens of different states," that is, where the whole controversy is between citizens of different states, then the word *controversy* would be synonymous with the word *suit*, but there may be more than one controversy in a suit, and the language of the act is broad enough to admit of that idea when it says:

"A suit * * in which there shall be a controversy between citizens of different states."

But the language of the act of 1867 is different from that of the act of 1875; it speaks of a suit in which there is *controversy*, and not in which there is "*a controversy*." This slight difference might not be significant if it were not for the fact that the act goes on further to provide that when the application for removal is made in proper form and the bond given as required, "it shall be the duty of the state court to proceed no further with the *suit*," thereby implying that the suit embraces the whole controversy,

whereas under the act of 1866, to which the act of 1867 is an amendment, it is expressly provided that the other parties to the suit might proceed in the state court, but that the "court could proceed no further against the defendant so applying for removal."

This court might, therefore, very properly have held, as it did in the Sewing Machine Cases, that the act of 1867 did not invest the federal judiciary with the full power over controversies between citizens of different states, which might have been done under the provisions of the federal Constitution; but the act of 1875 does fill the measure of power contemplated by that instrument.

JAS. O. BROADHEAD,
Sol. for Geo. E. Ketchum, James Baker, and Missouri Pacific Railway Co., Respondents.

Field

Supreme Court of the United States

OCTOBER TERM, 1879.

No. 242.

PACIFIC RAILROAD

vs.

GEORGE E. KETCHAM ET AL.

MATT H. CARPENTER,
Of Counsel for Appellant.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

No. 242.—OCTOBER TERM, 1879.

PACIFIC RAILROAD

vs.

GEORGE E. KETCHAM ET AL.

George E. Ketcham, a citizen of the State of New York, commenced this suit in the court below to foreclose a third mortgage given by the Pacific Railroad to Vail and Fish, as trustees, to secure bonds in the usual form. The complainant brought suit, claiming to be the owner of "several" of said bonds, and on behalf of himself and other bond-owners who might join him.

The complainant prayed a decree foreclosing the mortgage and ordering a sale of the road.

The bill contains allegations relied upon to charge the trustees, Vail and Fish, with neglect of duty, as trustees, sufficient to authorize a single bondholder to bring suit to foreclose the mortgage. Of course, to such a bill the trustees were necessary parties.

For this complainant to maintain this suit he must establish the misconduct of the trustees and the default of the company on mortgage.

In *Coal Company* v. *Blatchford*, 11 Wall., 177, this court, speaking of the trustees in a mortgage, say:

"They are parties to the mortgage contract negotiating its terms and stipulations, and to them the usual rights and powers of mortgagees are reserved, and to them the usual

obligations of mortgagors are made. The right to use different remedies is expressly provided upon default in the payments stipulated, and the adoption of either rests at the option of the plaintiffs. So long as they do not refuse to discharge the trusts reposed in them, other parties are not authorized to institute or prosecute any proceedings for the enforcement of the mortgage, or to exercise any control over them."

We shall argue hereafter that the bill shows no neglect or misconduct on the part of the trustees; but for the present concede that it does.

The act of March 3, 1875, (18 St. at L., part 3, p. 470,) gives the Circuit Courts of the United States jurisdiction "of all suits of a civil nature, at common law or in equity, * * * in which there shall be a controversy between citizens of different States."

Now, what is the controversy presented by the bill of complaint in this cause? The complainant seeks to foreclose the mortgage and sell the property, and the controversy is whether or not he is entitled to that relief. His right to this relief depends upon his establishing two facts: (1) that the trustees have been guilty of neglect or misconduct, and (2) that the company has made default on the mortgage.

To settle the first question, the plaintiff and the trustees must be before the court as opposing parties. The trustees are certainly necessary parties to the settlement of this question. They cannot be judicially charged with misconduct as trustees without a hearing. That they have been guilty of such misconduct, is averred by the plaintiff, and the question can only be tried between the plaintiff and them in a proceeding where they stand in an attitude adverse to the plaintiff. This question is between citizens of the same State, the plaintiff and the trustees being citizens of the State of New York, and therefore as to it the Federal courts have no jurisdiction.

To the bill of complaint as filed, both the trustees and the company might have made separate answers denying the misconduct of the trustees; and had this fact been determined against the plaintiff, that would have ended this suit.

Hence it results that a part of the one and single controversy between the plaintiff and the mortgagor company is a controversy between the plaintiff and citizens of his own State. That part of the controversy cannot be settled by the Federal courts. It is only where there is one *entire* controversy—complete in itself—*wholly* between citizens of different States, and which can be completely determined between them, that the Federal courts can have jurisdiction. Where the controversy as between the plaintiff, a citizen of one State, and one defendant a citizen of another State, necessarily depends upon another controversy which is really between the plaintiff and citizens of his own State, and cannot be separated in judgment, the Federal courts can have no jurisdiction.

That is precisely this case. The plaintiff cannot recover against the company unless he shall first succeed in establishing the misconduct of the trustees. To that part of the controversy the trustees are necessary parties defendant. The company and the trustees have a joint interest in that part of the controversy. The company is interested to defeat the plaintiff upon this point, because that would defeat the suit. The trustees are interested to defeat the plaintiff upon this point because, otherwise, they lose control of the trust, may be taxed with costs, and mulcted in damages. Therefore this controversy, which is an integral, an inseparable part of the whole controversy between the plaintiff and the company, is outside of Federal jurisdiction, and therefore the court must dismiss this case, because there is no controversy in it which is entirely between citizens of different States, which condition alone would entitle the plaintiff to any relief.

The case of *Meyer et al., Trustees*, v. *Delaware Railroad Co.*, decided this term—not yet reported—illustrates this point. That was a suit originally between citizens of Iowa, which had proceeded in the State court to a complete determination of the controversy between the original parties. Subsequently a supplemental bill was filed, raising a controversy wholly between the plaintiffs in that suit and citizens of another State; and this court held that the nonresident defendant could remove the suit into the Federal courts. But this court based its decision expressly upon the fact that the former controversy had been ended by the decision of the State court, and that the only live issue or existing controversy at the time of the removal was that which existed entirely and solely between citizens of different States, the debtor company having no interest whatever in the controversy. But in the case at bar there is no such separation of a controversy which is and one which is not the subject of Federal jurisdiction. Here the debtor company remained interested in both questions until both were settled against it by the final decree.

It may be said that the trustees, in their answer, make no issue with the averments of the bill, and therefore there is no controversy between them and the plaintiff. This will not do. Whether the Federal court has or has not jurisdiction of a suit in equity must depend upon the facts stated in the bill. To hold that where the bill shows a case not within Federal jurisdiction the case may be aided by answer of the defendant, would be conferring jurisdiction by consent, which cannot be done. And this as completely answers the argument, that neither did the company, by its answer, contradict the allegations of the bill in this behalf.

A suit brought by A against B in the Federal court, both being citizens of one State, is a case not within Federal jurisdiction, and it cannot be made so by the defendant's default or confession of judgment. A suit to be within

Federal jurisdiction, must be one in which, if the defendant contest it, every allegation of the plaintiff necessary to his case could be tried and determined by the court.

It is true there are cases which present distinct controversies, and if one such distinct controversy be between citizens of different States, the entire suit *may possibly be* removed from the State to the Federal courts. But in a case where, like this, the plaintiff's right to any relief whatever against the debtor company depends upon the determination of a question which can only be tried between other parties who are citizens of the same State, the Federal courts have no jurisdiction.

I.

I say, in the cases last mentioned jurisdiction *may* exist, because such concession is safe in this case. In the interest, however, of a sound construction of this statute, it must be borne in mind that the word "controversy" is synonymous with the word "suit." Curtis' Commentary, sec. 73, says:

"The term 'controversies,' as used in this section of the Constitution, is synonomous with civil suits, because it is used with reference to judicial proceedings between party and party. Controversies between citizens of different States, therefore, relate to suits between party and party, where one party is a citizen of one State, and the other party is a citizen of another State. From the fact that the jurisdiction is conferred on account of this relative situation of the parties, it follows that the situation of the parties to the record must determine whether the jurisdiction attaches."

Marshall, C. J., (5 Wheat., App., p. 16,) says:

"A case in law or equity was a term well understood, and of limited signification. It *was* a controversy between parties which had taken a shape for judicial decision."

In the light of these authorities, the statute should be

construed as though it read "in a suit between citizens of different States." And all the plaintiffs must be capable of suing all the defendants in the Federal courts. The parties to the controversy must be corresponding parties to the suit.

This is believed to be the doctrine of this court.

Osborn v. *The Bank of the United States*, 9 Wheat., 856.

Chappedelaine v. *Cheneaux*, 4 Cranch, 306.

Childress v. *Emory*, 8 Wheat., 668.

McNutt v. *Bland*, 2 How., 9.

Huff v. *Hutchinson*, 14 How., 586.

To hold that when a suit comes into a Federal court, no matter whether the plaintiffs are citizens of the same or different States, or whether the defendants are citizens of the same State with the plaintiffs or not, the court will examine the case, sort out, transpose, and rearrange the parties, making some plaintiffs defendants and some defendants plaintiffs, and then hold jurisdiction, would work infinite confusion and injustice. The plaintiff who brings a suit must show by his record that he has made the proper person defendant; and if he has not, he should go out of court, and come back properly.

III.

But if this court holds that there is jurisdiction, then we contend that the case shows no misfeasance or malfeasance on the part of the trustees, and therefore the plaintiff cannot maintain this suit.

a. By the mortgage the trustees had the option whether to wait until default had existed for six months and then proceed to foreclose by advertisement under the power of sale in the mortgage, or to resort to relief in a court of equity. This was for the trustees to decide, and a bond-

holder could not take the option or power of election from the trustees by bringing suit in equity to foreclose the mortgage. The statements in the bill do not show default or misfeasance of the trustees. (Record, fol. 18.)

b. There was but seven days between the default on interest (the coupons being entitled to three days' grace; *Evartson* v. *Bank of Newport*, 66 N. Y., 14, and *McCoy* v. *Washington Co.*, 3 Wall., J., 381) and the bringing of this suit by the bondholders. This, considering the nature of the case and the situation of the property, was not such delay as to amount to neglect on the part of the trustees, even had the mortgage not given them the option to wait for default of six months to foreclose by advertisement.

c. No default, refusal, or malfeasance of the trustees is set out in the bill that could authorize a bondholder to sue.

The suit of the bondholder should therefore be dismissed.

IV.

This being the nature of the case, the bill itself being demurrable on its face, the solicitor of the defendant had no power to consent to a decree against his client.

Holker v. *Parker*, 7 Cr., 436.

The record showing consent by the solicitor, no other consent can be presumed.

Galpin v. *Paige*, 18 Wall., 350.

V.

The decree is erroneous, and should be reversed, because it ordered a sale of the property without ascertaining the amount of interest due; that is, the amount the debtor company could pay and stop the sale.

Bill, Record, fol. 14, page 7.

Decree, Record, fol. 76, page 44.

The decree finds that of "the outstanding bonds" the interest maturing November 1, 1875, was due and unpaid, but does not find the amount of the outstanding bonds.

Clark v. *Reyburn*, 8 Wall., 318.

The case last cited was a case of *strict* foreclosure, but the same principles as to the necessity of finding the amount due and fixing a time for redemption apply here. The decree is fatally defective for this reason. The time to be fixed may be long or short, in the discretion of the court, but some definite time must be fixed before the court can order the property to be sold. The decree is fatally defective in this particular.

Jones v. *Bosworth*, 3 Bland, 194, note.

In *Bronson* v. *Railroad Co.*, 2 Wall., 312, this court fixed one year, in case where the default was non-payment of interest only.

See cases cited in joint brief, pp. 25, 30.

VI.

The decree is fatally defective in this: that it sold the property without ascertaining whether the claim of St. Louis county for $750,000 was valid or void.

The validity of this claim was asserted, but not even confessed, *by the solicitor* of the debtor company. He confessed and consented to many things against his client, but not this.

VII.

The confirmation of the sale to *the defendant's solicitor* was erroneous, and must be set aside, even if the decree is affirmed.

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